In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-534

UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL.,
APPELLANTS

v.

JACINTA MORENO, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

INDEX TO APPENDIX

DOCKET ENTRIES

No. 615-72 in the United States District Court for the District of Columbia.

Date	Proceedings
1972	
Mar. 30	Complaint, filed
Mar. 30	Summons, copies (6) and copies (6) of Complaint issued DA ser 3-31-72; #1, 2, 3 & 4 ser 3-31-72; Dept. of Justice ser 3-31-72. filed
Mar. 30	Motion of Pltfs. for Temporary Restraining Order; Memorandum of Law; Appendix "A"; Affidavit of Jacinta Moreno; Affidavit of Victoria Keppler; Affidavit of Sheilah Ann Hejny; Affidavit of David S. Durrant with Exhibit A; Affidavit of David A. Kilmer with Exhibit A; Affidavit of Michael Hoffman, David McElyea, Deborah Jirel, Deborah Small and Michael Gaddy. filed
Mar. 30	Motion of Pltfs. for a Preliminary Injunction. filed
Mar. 30	Motion of Pltfs. for A Class Action Order. filed
Mar. 30	Application of Pltfs. for Three-Judge Court; Memorandum. filed
Apr. 4	Request to designate three-judge court. (N) Smith, J.
Apr. 5	Opposition of Federal defts. to pltfs' request for temporary restraining order; aff.; exh. 1; P&A; statement; c/s 4-5-72. filed
Apr. 5	Motion for temporary restraining order argued and granted; bond $1.00 cash or security. (Order to be presented) Smith, J.
Apr. 6	Injunction undertaking of pltf. in the amount of $1.00 cash per order of April 6, 1972. filed
Apr. 6	Order granting temporary restraining order until hearing by three-judge court; directing forthwith service by Marshal upon defts.; issued 10:45 a.m. (N) DA, AG & deft. ser. 4-6. Smith, J.

Date	Proceedings
1972	
Apr. 10	Designation of the Hon. Carl McGowan, United States Circuit Judge and the Hon. Aubrey E. Robinson, Jr., United States District Judge to serve with the Honorable John Lewis Smith, Jr. as members of a three-judge panel to hear and determine this cause. (N) Bazelon, C. J., U.S.C.A.
Apr. 14	Opposition of defts. to pltfs' motion for a preliminary injunction; motion to dissolve the temporary restraining order; motion to dismiss; statement; P&A; c/m 4-14. filed
Apr. 14	Motion for preliminary injunction argued and taken under advisement; counsel for pltf. and deft. granted five days to file memo. on matter or jurisdiction; temporary restraining order continued until further order. McGowan, J., Robison, J., Smith, J.
Apr. 19	Cross motion of pltf. for summary judgment; P&A; appendix A; c/m 4-18; M.C. filed
Apr. 20	Supplemental P&A by defts. in support of proposition that this court lacks jurisdiction; c/m 4-20. filed
May 26	Memorandum opinion in favor of pltfs. Smith, J.
May 26	Order granting pltfs motion for summary judgment; denying defts' motion for summary judgment; enjoining defts. from denying food stamp eligibility to pltfs. (N) (see order for details) McGowan, J., Smith, J., Robinson, J.
Jun. 23	Notice of appeal by defts. to Supreme Court from judgment of May 26, 1972.

No. 72-534 in the United States Supreme Court.

1972

Aug. 16	Order Extending the Time for Docketing The Appeal.
Oct. 2	Jurisdictional Statement Filed.
Nov. 1	Motion to Affirm Filed.
Dec. 4	Order Noting Probable Jurisdiction.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Filed March 30, 1972]

JACINTA MORENO (residing at 18720 S.W. 270 Terrace; Homestead, Florida); VICTORIA KEPPLER (residing at 208 Modoc; Oakland, California); SHEILA ANN HEJNY (residing at Route 3, Trailer #9, Willamont Drive; Kernersville, North Carolina); DAVID A. KILMER and DAVID S. DURRANT (both residing at 84 N Street; Salt Lake City, Utah); MICHAEL GADDY, DEBORAH JIREL, MICHAEL HOFFMAN, DEBORAH SMALL and DAVID McELYEA (all residing at 727 Sims Street; Columbia, South Carolina); for themselves, their households, and all other persons similarly situated,

PLAINTIFFS,

—VS.—

THE UNITED STATES DEPARTMENT OF AGRICULTURE; EARL L. BUTZ, individually and in his capacity as Secretary of the United States Department of Agriculture; EDWARD J. HEKMAN, individually and in his capacity as Administrator of the Agriculture Department's Food and Nutrition Service; JAMES KOCHER, individually and in his capacity as Food Stamp Division Director of the Agriculture Department's Food and Nutrition Service,

DEFENDANTS.

Civil Action No. .....
Complaint for Declaratory and Injunctive Relief
Application for Three-Judge Court

I. INTRODUCTION

1. This civil action for declaratory and injunctive relief is brought because the plaintiffs seek to enjoin the implementation of the "anti-hippy commune" provision in the

Food Stamp Act [7 U.S.C. § 2012(e), as amended by P.L. 91-671 (Jan. 11, 1971)] and the regulations promulgated thereunder [7 C.F.R. §§ 270.2(jj) and 271.3(a), as published in 36 Fed. Reg. 14103, 14106 (July 29, 1971)]. Although the plaintiffs are impoverished persons with insufficient resources to purchase a nutritionally adequate diet, and although the plaintiffs are not—and do not consider themselves to be—hippies, they are denied Federal food stamps *solely* because of the "anti-hippy commune" provisions in the Food Stamp Act and regulations. Those provisions deny food stamps to needy persons and families who reside in households in which at least one individual is unrelated to all of the other household members.

2. The Food Stamp Act [7 U.S.C. §§ 2011 *et seq.*] was passed by Congress in 1964, and amended in 1971 [P.L. 91-671], to provide direct relief against conditions of undernutrition and hunger existing throughout the country. The operation of the Food Stamp Program is fairly simple: a poverty-stricken household is charged with a certain amount of money and in exchange receives food stamps of greater value. The difference between the stamps received—the "coupon allotment"—and the cost of the stamps is a bonus which provides recipients with a direct increase in food purchasing power. The allotment provided to recipients is intended to provide them with the means of purchasing "a nutritionally adequate diet through normal channels of trade." [7 U.S.C. § 2011] Participation in the Program is limited to impoverished *households*. [7 U.S.C. § 2014(a)]

3. Prior to the 1971 amendments to the Food Stamp Act, impoverished households were eligible for food assistance regardless of whether there were unrelated people residing therein. Due to the passage of the 1971 amendments to the Act and the promulgation of regulations pursuant thereto [see 7 U.S.C. § 2012(e), afer the passage of P.L. 91-671; 7 C.F.R. §§ 270.2(jj) and 271.3(a), as contained in 36 Fed. Reg. 14103 and 14106], no person—no matter how needy, hungry or malnourished—is eligible to receive health-vital food stamp aid if he resides in a household where one or more persons, under 60 years of age, is unrelated to everyone else in the household.

4. As a result of the amended statute and regulations, the plaintiffs—who are financially eligible for food stamps

but who live in households in which all members are not related to one another—will no longer be able to participate in the Food Stamp Program. They, like several hundred thousands of other indigents, will be excluded from health-vital food aid solely because they live with unrelated persons due to economic necessity.

5. Although the statutory amendment was directed exclusively against "hippy communes," * the poorest of the poor will be most harmfully effected by the new statutory and regulatory provisions. Since the poorest of the poor frequently are unable to pay for shelter costs and must, therefore, frequently reside with friends or former neighbors, they will be severely and irreparably harmed by the new statutory and regulatory provisions.

6. The "anti-hippy commune" provisions in the statute and regulations are unlawful for the following reasons:

(a) They impinge upon plaintiffs' privacy rights to associate, in the confines of their home, with whomever they choose, thereby violating the First, Fifth and Ninth Amendments to the United States Constitution;

(b) They violate plaintiffs' rights to equal protection since the statute and regulations create two different classes —(1) needy persons who reside in households where everyone is related, and (2) needy persons who reside in households where everyone is not related—and discriminate against the latter class in the provision of health-vital food aid without any rational justification therefor, thereby violating the Fifth Amendment to the United States Constitution; and

(c) They violate plaintiffs' rights to equal protection since the discriminatory deprivation of food assistance impinges upon plaintiffs' freedom of association without there being a "compelling governmental interest" to justify said discrimination, thereby violating the Fifth Amendment to the United States Constitution.

7. The "anti-hippy commune" regulations are further unlawful insofar as they are contrary to the Food Stamp Act. Under section 3(e) of the Act [7 U.S.C. § 2012(e)], only unrelated *individuals* in a household are to be denied

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* See Conf. Rep. as set forth at Cong. Rec., 91st Cong., 2d Sess. (12/22/70) at H12267; see also Cong. Rec., 91st Cong., 2d Sess. (12/31/70), at S21682 and S21690.

food stamp aid. Contrary to the Act, however, the regulations exclude everyone—*individuals and families*—when one or more unrelated persons reside in the same house.

II. Jurisdiction

8. Jurisdiction is conferred on this Court by 28 U.S.C. §§ 1331, 1332, 1337, 1361; and 5 U.S.C. § 702 (the Administrative Procedure Act). The amount in controversy, exclusive of interest and costs, exceeds $10,000. A declaration of plaintiffs' rights is sought pursuant to 28 U.S.C. §§ 2201 and 2202.

III. Three-Judge Court

9. This is a proper case for determination by a three-judge Court pursuant to 28 U.S.C. §§ 2282 and 2284, since plaintiffs seek an injunction to restrain defendants, who are Federal officials, from the enforcement, operation and execution of the Federal statute and Federal regulations on the ground that said statute and regulations are contrary to the Constitution of the United States.

IV. Plaintiffs

10. All of the plaintiffs are poor and fall within the national income eligibility standards set by the Agriculture Department for Food Stamp Program participation. The plaintiffs are from five different cities and states; they reside in: Homestead, Florida; Oakland, California; Kernersville, North Carolina; Salt Lake City, Utah; and Columbia, South Carolina. Despite plaintiffs' vulnerable nutritional status, and although they were previously eligible for Federal food assistance, they have been denied food stamp eligibility because each one of them lives in a household in which there is at least one individual unrelated to all of the other household members. Consequently, the plaintiffs are unable to obtain adequate nutrition for themselves and their households.

A. The MORENO Household

11. Plaintiff JACINTA MORENO is 56 years of age. Since plaintiff MORENO is a diabetic and in extremely

poor health, she has decided to live with Ermina Sanchez and the latter's three children in Homestead, Florida. Mrs. Sanchez helps to take care of plaintiff MORENO, and the two of them share common living expenses. Plaintiff MORENO's monthly income is $75, derived entirely from public welfare; Mrs. Sanchez receives a total monthly income of $133, derived entirely from the Aid to Needy Families With Dependent Children Program. Out of this income, the household pays: $95 per month for rent (of which plaintiff MORENO pays $40) and $40 a month for gas and electricity (of which $10 is paid by the plaintiff). In addition, plaintiff MORENO must spend $10 for transportation for her two monthly visits to the hospital, and $5 each month for laundry expenses. As a result, plaintiff MORENO has only $10 remaining each month with which to purchase food and other necessities. This is wholly inadequate, particularly since plaintiff MORENO needs special foods for her poor health condition.

12. On February 1, 1972, plaintiff MORENO's application for food stamps was denied solely because she is unrelated to all of the other members of her household. If the "anti-hippy commune" provisions of the Act and regulations did not exist, plaintiff MORENO would be eligible for $32 in monthly food stamps. Instead, however, the "anti-hippy commune" provision disqualifies plaintiff MORENO from all Federal food assistance. This causes severe and irreparable harm to plaintiff MORENO's very vulnerable health condition.

B. The KEPPLER Household

13. Plaintiff VICTORIA KEPPLER resides in Oakland, California with her two children. Plaintiff KEPPLER's daughter suffers from an acute hearing deficiency and she must, therefore, attend a school for the deaf—Chabot Public School—which provides her with treatment and special educational services. Since plaintiff KEPPLER is a public assistance recipient with a total monthly income of $235, she has found it impossible to afford decent housing arrangements within the vicinity of her daughter's school. Consequently, plaintiff KEPPLER and an unrelated friend —who is also receiving welfare—have moved into a house together. By combining their resources, plaintiff KEPP-

LER and her friend are barely able to afford the $275 monthly rent for a house outside of the slums and near the Chabot Public School.

14. Although plaintiff KEPPLER is poor and unable to obtain a nutritionally adequate diet for herself and her children, she has been denied food stamp eligibility because of the "anti-hippy commune" provisions in the food stamp regulations. If plaintiff KEPPLER did not share the same house with an unrelated friend, she would be eligible for $88 every month in food stamps. Consequently, plaintiff KEPPLER faces the following tragic dilema: *either* move out of the house, in order to obtain food stamps, thereby relocating in dilapidated housing considerably far away from the Chabot Public School; *or* stay in the house and continue to be deprived of health-vital food assistance.

C. The HEJNY Household

15. Plaintiff SHELIAH ANN HEJNY resides in Kernersville, North Carolina with her husband, David Lee Hejny, their three children, and Sharon Sharp. Sharon is 20 years old and is unrelated to the HEJNY family. Prior to moving in with the HEJNY family, Sharon lived in a "children's home" (from ages 7 to 18); after leaving the "children's home," she lived with her mother until November 21, 1970, when her mother forced Sharon to leave the Sharp's home. On that date, plaintiff HEJNY—who was a next door neighbor to the Sharp family—started to take care of Sharon and they have resided together ever since. Since moving into the HEJNY household, Sharon has become an integral member of the household and has received much love and care.

16. The HEJNY household has a total monthly income of about $410—$390 from David Hejny's job as a pipe-layer, and $20 from Sharon's job as a babysitter for neighbors. Out of this meager income the household pays $38.50 every week for the rental of a trailer, and $70 every week for back rent still owed. In addition, the household has substantial monthly expenditures for clothing, food, household goods, hygienic needs, laundry, personal incidentals, and medical expenses. Currently, the household has huge debts that they are trying to pay off: $1400 in medical bills due to the repeated health problems of daughter Tracy Hejny

(who was born with an open spine and who, as a result, was operated on, and hospitalized, numerous times); and $800 in medical bills as a result of plaintiff HEJNY's gall bladder operation in June, 1971. Further medical expenses are expected very shortly due to Tracy's condition, and because David Hejny has a hereditary tumor that will require surgery very soon.

17. As a result of the HEJNY's impoverished circumstances, they are in great need of food aid. During February, 1972, the household was certified for food assistance and received $144 in food stamps at a cost of $14. On or about February 28, 1972, plaintiff HEJNY was informed that the household would no longer be eligible for food assistance due to Sharon's presence in the home. In March, 1972, they did not receive any food stamps. This, and any continued, deprivation of Federal food assistance will cause irreparable injury insofar as the household's limited income, and large debts, make it impossible to obtain a nutritionally adequate diet. The HEJNY household is denied the opportunity to receive proper nutrition solely because they have been charitable enough to care and provide for a previously unwanted child.

D. The KILMER-DURRANT Household

18. Plaintiffs DAVID A. KILMER and DAVID S. DURRANT share common living quarters in Salt Lake City, Utah. They have found it necessary to share living quarters because they are poor and their housing arrangements minimize necessary expenses. Plaintiff KILMER earns approximately $70 per month by performing numerous jobs such as housing repairs and remodeling. Plaintiff DURRANT earns approximately $100 per month from similar work. Out of this approximate $170 in income, plaintiffs KILMER and DURRANT have the following monthly expenses: rent—$100; gas, water and sewage—$40; electricity—$5; laundry—$5; and food—$30. In addition, the plaintiffs have expenses for clothing, hygienic needs and personal incidentals. Moreover, they must pay $36 every month for car payments and about $20 for oil and gas. These car expenses are necessary because of the distance that must be travelled to plaintiffs' jobs and because plaintiff DUR-

RANT receives job rehabilitation instruction at the University of Utah.

19. As a result of their impoverished status, plaintiffs KILMER and DURRANT have frequently been unable to pay for their household expenses and they have been forced to drastically limit their food purchases. They applied for food stamp relief on January 10, 1972 but were denied such aid because they compose a household of unrelated individuals. Solely as a result of the "anti-hippy commune" provisions, they are denied $60 in monthly food stamp benefits that they would otherwise be entitled to. Plaintiffs sought an administrative hearing on the denial decision and such hearing was conducted on February 14, 1972. Shortly thereafter, the decision to deny food stamp eligibility was affirmed. As a result, plaintiffs KILMER and DURRANT are, and will be, denied the $60 in food stamp aid that they desperately need in order to obtain adequate nutrition.

E. The Household of MICHAEL GADDY, DEBORAH JIREL, MICHAEL HOFFMAN, DEBORAH SMALL and DAVID McELYEA

20. Plaintiffs MICHAEL GADDY, DEBORAH JIREL, MICHAEL HOFFMAN, DEBORAH SMALL and DAVID McELYEA reside together in Columbia, South Carolina. Plaintiffs JIREL, HOFFMAN, SMALL and McELYEA are presently unemployed and are seeking a job. Plaintiff GADDY is a full-time student at the University of South Carolina. The five plaintiffs, being without a steady income, have chosen to live together partially because they wish to reduce their expenses, and partially because they have a strong social affinity for one another. The household's monthly expenses include: rent—$75; food—$120; utilities—$34; telephone—$14; laundry—$10; and automobile costs—$30.

21. Since the plaintiffs are without income and are impoverished, they are in dire need of food stamp assistance. They are *financially* eligible for $128 in monthly food stamps for no cost whatsoever. As a result of the related household provisions in the Act and regulations, however, they have been declared ineligible for Federal food assist-

ance. Consequently, they suffer irreparable injury due to their inability to obtain adequate food sustenance.

V. Plaintiffs Bring This Suit as a Class Action

22. Plaintiffs are all impoverished persons who need food stamps for their nutritional well-being, but who are denied health-vital food relief solely because they live in households in which all persons residing therein are not related to one another. Many thousands of needy persons throughout the country are similarly aggrieved by the "anti-hippy commune" provision of the Food Stamp Act and the regulations promulgated thereunder. Consequently, plaintiffs bring this action pursuant to Rule 23 of the Federal Rules of Civil Procedure, in their own behalf, in behalf of their households, and in behalf of indigents throughout the country who are similarly aggrieved by the defendants' unconstitutional denials of food stamps. The questions of fact and law are common to the plaintiffs and the class they represent, and the members of the class are so numerous as to make joinder of parties impracticable. The claims of the plaintiffs are typical of the claims of all members of their class, and the plaintiffs will fairly and adequately represent the claims of all members of the class. The defendants have acted or refused to act on grounds generally applicable to the entire class.

VI. The Defendants

23. Defendant EARL L. BUTZ is the Secretary of the United States Department of Agriculture. Defendant EDWARD J. HEKMAN is the Administrator of the Agriculture Department's Food and Nutrition Service. Defendant JAMES KOCHER is the Food Stamp Division Director of the Agriculture Department's Food and Nutrition Service. Since the Food Stamp Division of the Agriculture Department's Food and Nutrition Service is the agency responsible for administering the nationwide Food Stamp Program, the defendants are fully responsible for implementing the unconstitutional statutory and regulatory provisions challenged herein.

VII. Causes of Action

24. The Food Stamp Program was established by Congress in 1964 to alleviate hunger and malnutrition among low-income groups. The Program was designed to provide needy households with sufficient food stamps so that they can obtain a "nutritionally adequate diet through normal channels of trade." [7 U.S.C. § 2011] For poor people throughout the country, the Food Stamp Program provides the difference between undernutrition and nutritional adequacy. Eligibility in the Program is limited exclusively to a household basis.

25. Prior to the 1971 amendments to the Food Stamp Act [P. L. 91-671 (Jan. 11, 1971)], section 3(e) of the Act defined a "household" as follows:

> The term "household" shall mean a group of *related or non-related* individuals, who are not residents of an institution or a boarding house, but are living as one economic unit sharing common cooking facilities and for whom food is customarily purchased in common. The term "household" shall also mean a single individual living alone who has cooking facilities and who purchases and prepares food for home consumption. [7 U.S.C. § 2012(e), prior to P.L. 91-671] (emphasis added)

26. The 1971 amendments substantially altered the Food Stamp Act. *Inter alia*, the new legislation contained an "anti-hippy commune" provision that amended section 3 (e) of the Act to read as follows:

> The term "household" shall mean a group of *related individuals* (including legally adopted children and legally assigned foster children) *or non-related individuals over age 60* who are not residents of an institution or boarding house, but are living as one economic unit sharing common cooking facilities and for whom food is customarily purchased in common. The term "household" shall also mean (1) a single individual living alone who has cooking facilities and who purchases and prepares food for home consumption; or (2) an elderly person who meets the requirements of section 10(h) of this Act. [7 U.S.C. § 2012(e)] (emphasis added)

27. The intent of Congress in redefining the term "household" was to eliminate "hippy communes" from the Food Stamp Program. Although there is sparse legislative history on this provision—since it was introduced for the first time during the Conference Committee's deliberations on the differing House and Senate versions of the Food Stamp Act amendments—it is clear that the amendment to section 3(e) was intended to exclude "hippy communes" from Federal food assistance. [See Conf. Rep. as set forth at Cong. Rec., 91st Cong., 2d Sess. (12/22/70), at H12267; see, also, Cong. Rec., 91st Cong., 2d Sess. (12/31/70), at S21682 and S21690]

28. On July 29, 1971, the defendants promulgated regulations pursuant to the new Food Stamp Act amendments. Two sections of the regulations, 7 C.F.R. §§ 270.2(jj) and 271.3(a), were promulgated to implement section 3(e) of the Act. Those sections state:

> "Household" means a group of persons, excluding roomers, boarders, and unrelated live-in attendants necessary for medical, housekeeping, or child care reasons, who are not residents of an institution or boarding house, and who are living as one economic unit sharing common cooking facilities and for whom food is customarily purchased in common:
> Provided, That:
> (1) *When all persons in the group are under 60 years of age, they are all related to each other,* and
> (2) When more than one of the persons in the group is under 60 years of age, and one or more other persons in the group is 60 years of age or older, *each of the persons under 60 years of age is related to each other or to at least one of the persons who is 60 years of age or older.* It shall also mean (i) a single individual living alone who purchases and prepares food for home consumption, or (ii) an elderly person as defined in this section, and his spouse. [7 C.F.R. § 270.2(jj)] (emphasis added)
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> *Eligibility for and participation in the program shall be on a household basis. All persons,* excluding roomers, boarders, and unrelated live-in attendants neces-

sary for medical, housekeeping, or child care reasons, *residing in common living quarters shall be consolidated into a group prior to determining if such a group is a household as determined in § 270.2(jj) of this subchapter.* [7 C.F.R. § 271.3(a)] (emphasis added)

29. All of the plaintiffs are financially eligible for food stamp assistance. Solely as a result of the new "anti-hippy commune" provisions in the Act and regulations, the needy plaintiffs are being denied this health-vital food aid. The "anti-hippy commune" provisions went into effect either on January, February or March, 1972, depending upon the State.

30. Paragraphs 11-21 are reiterated and incorporated herein.

A. Plaintiffs' Privacy Rights to Freedom of Association in the Confines of Their Home.

31. The impoverished plaintiffs herein reside with unrelated people in order to minimize their costs of living, and/or because of related social necessities. By living with persons to whom they are unrelated by blood or marriage, the plaintiffs are exercising their inalienable rights to privacy and to freedom of association as guaranteed by the First, Fifth and Ninth Amendments to the United States Constitution.

32. Plaintiffs' constitutional rights to freedom of association are particularly free from governmental invasion when such rights are exercised in the privacy of their home. Inherent in the Constitution is plaintiffs' right to safety from governmental invasion when such plaintiffs are engaged in legal activities in the confines of their home.

33. By denying plaintiffs health-vital food assistance solely because their households include one or more unrelated members, the plaintiffs are being penalized for exercising their inalienable constitutional rights to privacy and freedom of association. This impingement upon plaintiffs' constitutional rights is not justified by any compelling governmental interest.

34. In addition, the prohibitive sweep of the statute and regulations is overly broad, thereby harming indigents who were not intended to be excluded from food stamp assist-

ance. Although the plaintiffs are not—and do not consider themselves to be—hippies, their freedom of association is being violated, and they are denied vital food stamp relief, solely because of the "anti-hippy commune" provisions in the Act and regulations. This overly-broad governmental effort to regulate plaintiffs' lives, particularly in the confines of their home, violates plaintiffs' rights to privacy and freedom of association.

35. As a result, the "anti-hippy commune" provisions of the Food Stamp Act and regulations are violative of the First, Fifth and Ninth Amendments to the United States Constitution.

B. Plaintiffs' Rights to Equal Protection

36. The "anti-hippy commune" provisions create two classes of persons for purposes of food stamp eligibility; *one class* composed of persons financially in need of food stamp relief who reside in households in which all members are related to one another; and *another class* composed of persons similarly in need of food stamp relief, but who live in households that include one or more members who are unrelated to everyone else in the household. Except for this difference, members of the latter class are indistinguishable form those in the former class.

37. Persons in the second class—including the plaintiffs herein—are denied food stamps but persons in the first class are eligible for food stamp relief. This arbitrary and capricious discriminatory deprivation of food assistance is not rationally related to any legitimate governmental purpose, and is wholly unrelated to the purposes of the Food Stamp Act.

38. In addition, the discriminatory deprivation of food assistance impinges upon plaintiffs' constitutional rights of freedom of associaton. The Congressonal intent to deprive "hippy households" of food stamp relief does not constitute a "compelling governmental interest" that could justify this discrimination that impinges upon plaintiffs' rights to freedom of association.

39. As a result, the "anti-hippy commune" provisions of the Food Stamp Act and regulations violate plaintiffs' rights to Equal Protection as guaranteed by the Fifth Amendment to the United States Constitution.

C. The Regulations Conflict With the Act

40. Section 3(e) of the Act [7 U.S.C. § 2012(e)], while excluding unrelated "*individuals*" from food stamp assistance, permits impoverished *families* to be eligible for food stamp assistance. Each family may constitute a group of related individuals "living as one economic unit sharing common cooking facilities and for whom food is customarily purchased in common." [7 U.S.C. § 2012(e)] Section 3(e), therefore, would *deny food stamp eligibility only to the unrelated individuals* living under the same roof as the impoverished *families, but would extend eligibility to those families.*

41. Congressional intent was to exclude "hippy communes" of *unrelated individuals* from food stamp assistance; Congress did not intend to exclude impoverished *families* from the Program, regardless of who lived with them.

42. The regulations promulgated by the defendants deny food stamp eligibility to both unrelated individuals and to the families they live with. Consequently, the defendants have denied food stamps to the KEPPLER and HEJNY families despite their clear eligibility under the Act.* In so doing, the defendants have violated sections 3(e) and 4(a) of the Food Stamp Act. [7 U.S.C. §§ 2012(e) and 2013(a)]

VIII. The Harm to Plaintiffs and Their Class

43. Plaintiffs' impoverished circumstances have left them unable to obtain a nutritionally adequate diet. They and their households are in dire need of food assistance so that they can obtain proper nutrition. If plaintiffs and their class do not receive food stamp aid, they and their households will be subjected to the irreparable injuries resulting from hunger, undernutrition, and consequent ill-health.

44. Since the plaintiffs are poor, they have decided to live with unrelated people in order to economize their meager resources and to provide better health care and

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* Plaintiffs MORENO, KILMER, DURRANT, GADDY, JIREL, HOFFMAN, SMALL and McELYEA, as well as Sharon Sharp (who resides in the HEJNY household), are uneffected by defendants' violation of *the Food Stamp Act.* Their claims are based exclusively on their constitutional rights to privacy, equal protection and freedom of association.

sustenance for one another. The "anti-hippy commune" provisions of the Act and regulations have a very chilling effect on plaintiffs' freedom of association and privacy rights and may cause them to change their current living arrangements. This would cause further economic hardship for the plaintiffs, and would irreparably harm their physiological and psychological well-being.

IX. Prayer for Relief

45. Plaintiffs, and all others similarly situated, are suffering, and will continue to suffer, grievous injury as a result of the "anti-hippy commune" provisions in the Food Stamp Act and regulations. They seek relief from these unlawful and unconstitutional provisions. No previous application for the relief sought herein has been made to this or any other Court. No adequate administrative remedy or adequate remedy at law is available to the plaintiffs.

Wherefore, plaintiffs, on behalf of themselves, their households, and all others similarly situated, pray that this Court:

a. Assume jurisdiction of this case;

b. Convene a three-judge Court, pursuant to 28 U.S.C. §§ 2282 and 2284, and set this case down promptly for a hearing and determination of this controversy;

c. Order, pursuant to Rules 23(b)(2) and 23(c)(1) of the Federal Rules of Civil Procedure, that this action shall be maintained as a class action in behalf of all impoverished households in the country who are similarly aggrieved by the "anti-hippy commune" provisions of the Food Stamp Act and regulations;

d. Grant a temporary restraining order pursuant to 28 U.S.C. § 2284(3), pending a hearing and determination by the three-judge Court, enjoining the defendants from denying health-vital food stamps to plaintiffs, and all other impoverished persons similarly situated, solely on the basis that such individuals reside in households in which all members are not related to one another;

e. Declare that the "anti-hippy commune" provisions of the Food Stamp Act and regulations violate plaintiffs' rights to privacy and freedom of association as guaranteed by the First, Fifth and Ninth Amendments to the United States Constitution;

f. Declare that the "anti-hippy commune" provisions of the Food Stamp Act and regulations violate plaintiffs' rights to equal protection as guaranteed by the Fifth Amendment to the United States Constitution;

g. Declare that the regulations promulgated by the defendants [7 C.F.R. §§ 270.2(jj) and 271.3(a)] violate sections 3(e) and 4(a) of the Food Stamp Act [7 U.S.C. §§ 2012(e) and 2013(a)];

h. Preliminarily and permanently enjoin the defendants—their agents, employees and successors in office—from denying food stamp eligibility to the plaintiffs, and all other persons similarly situated, on the basis that all members in their households are not related to one another; and

i. Provide such further relief as this Court may deem proper and just.

Respectfully submitted,

/s/ Ronald F. Pollack
RONALD F. POLLACK
Center on Social Welfare
Policy and Law
401 West 117th Street
New York City, New York 10027
(212) 280-4112

/s/ Roger Schwartz
ROGER SCHWARTZ
401 West 117th Street
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Of Counsel:

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(202) 624-8318

[Title Omitted in Printing]

[Filed March 30, 1972]

APPLICATION FOR THREE-JUDGE COURT

Plaintiffs, pursuant to 28 U.S.C. §§ 2282 and 2284, respectfully move this Court to apply to:

The Chief Judge of the Circuit to convene a statutory Court of three judges for the purpose of hearing and determining this application for a preliminary and permanent injunction. As reason therefor, plaintiffs would show that a preliminary and permanent injunction is being sought to restrain Federal officials from enforcing a Federal statute that is alleged to conflict with the Constitution of the United States. The preliminary and permanent injunctions are sought to restrain the defendants from denying plaintiffs, and all persons similarly situated, eligibility in the Food Stamp Program solely on the basis that plaintiffs live in households in which all members are not related to one another.

Plaintiffs seek this relief for themselves and all others similarly situated on the grounds that:

a. They and all others similarly situated are suffering irreparable damage in that without food stamp benefits they are unable to provide themselves and their families with a nutritionally adequate diet;

b. Section 3(e) of the Food Stamp Act [7 U.S.C. § 2012 (e)] and the regulations promulgated thereunder [7 C.F.R. §§ 270.2(jj) and 271.3(a)] deny plaintiffs food stamps because they reside in homes with unrelated persons, thereby violating plaintiffs' rights to equal protection, privacy and freedom of association as guaranteed by the First, Fifth and Ninth Amendments of the United States Constitution.

c. Plaintiffs have no adequate remedy at law.

Respectfully submitted,

/s/ Ronald F. Pollack
RONALD F. POLLACK
Center on Social Welfare
Policy and Law
401 West 117th Street
New York, New York 10027
(212) 280-4112

/s/ Roger Schwartz
ROGER SCHWARTZ
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JOHN R. KRAMER
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(202) 624-8318

[Title Omitted in Printing]

AFFIDAVIT OF JACINTA MORENO

STATE OF FLORIDA
COUNTY OF DADE } ss:

[Filed March 30, 1972]

JACINTA MORENO, being duly sworn, deposes and says:

1. I am a plaintiff in this lawsuit. I am 56 years old and reside at 18720 S.W. 270 Terrace, Homestead, Florida.

2. My household consists of five persons: myself, Ermina Sanchez, 37, and her three children, Ramon, Jr., 7, Sylvia, 6, and Pauline, 1. Mrs. Sanchez and her three children are not related by blood to myself.

3. Both Ermina Sanchez and myself receive a minimal monthly income which would be insubstantial for us to live on as separate households. We chose to share one household in order to minimize our costs of living. We share the cost of rent, food and other household items, and share the use of these items as well as the use of our kitchen facilities. I have found this arrangement to be both economically and socially beneficial.

4. My income for the month of January, 1972, was $75 which I received from the Dade County Department of Public Welfare, for the support and maintenance of myself. This check was based on my living cost in Homestead, Florida.

5. Ermina Sanchez's monthly income for this month consisted solely of $133 from the State of Florida, Department of Public Welfare, Aid to Dependent Children Program.

6. I anticipate that the total monthly income of our household for February 1972 will be approximately $208, consisting of my monthly public assistance grant and Ermina Sanchez's monthly public assistance grant.

7. My monthly household expenses include the following items:

Rent	$40	
Gas & Electricity (monthly average)	10	
Transportation	10	Total $75
Laundry	5	
Food	10	

(This is all that's left from Welfare check)

In addition to these expenditures we have costs for clothing, hygienic needs and other personal incidentals.

8. Medical problems have added a substantial expense to the monthly household budget. At present I make two monthly trips to the county hospital due to my condition of diabetes. The county hospital furnishes medication to me without charge due to my inability to pay. However, I am advised to follow a strict diet, which I am not able to adhere to due to financial inability.

9. Mrs. Sanchez's monthly household expenses include the following items:

Rent	$55	
Gas & Electricity (monthly average)	30	
Transportation	15	Total $133
Laundry	15	
Food	18	

10. We are barely able to meet these monthly living expenses. Our success in the past is partially due to the aid Ermina Sanchez receives through Food Stamps. She is certified as the head of a four-member household and pays $18 each month for $108 worth of coupons. This bonus of $90 is essential since it allows us to meet our nutritional needs.

11. I have applied for food stamps before. The latest date was February 1, 1972, at the local Food Stamp Office in Homestead. I was told I was not eligible because of our unrelated household status and denied stamps.

12. The loss of food stamps seriously affects my household. I am unable to meet the high cost of living and the badly needed special dietary requirements I have had in the past. Consequently, I buy less food for myself and I do without necessary personal and hygienic needs. I am,

in short, burdened with additional expenses that I cannot afford and still hope to maintain a poor but healthy household.

13. If the new Food Stamp statute and regulations requiring that a Food Stamp household contain only related individuals were not in effect, I would benefit from Food Stamps. I estimate that I could purchase monthly $32 worth of stamps for a maximum of $12, thereby saving $20, a sum equivalent to 26 per cent of my present income. My saving will probably be a good deal higher since I am entitled to medical deductions in calculating my monthly income.

14. If the new Food Stamp regulations allowed unrelated households to be eligible for Food Stamps, I could expect to provide myself with a more medically and nutritionally sound diet. As long as I am denied eligibility, however, I will have to continue to deprive myself of necessary food, clothing and household items, and the promise of food relief to those of us in low-income families shall be meaningless.

/s/ X (Jacinta Moreno)
JACINTA MORENO
Witness: Norma Cabrera
Joe Alexander

Subscribed and sworn to
as true before me this
22nd day of February,
1972.

Brenda Sue Baldwin
Notary Public, State of
Florida at large.

My commission expires:
Notary Public, State of Florida at Large,
My commission expires Nov. 9, 1975,
Bonded thru Gen. Insur. Underwriters, Inc.

[Title Omitted in Printing]

[Filed March 30, 1972]

AFFIDAVIT OF VICTORIA KEPPLER

STATE OF CALIFORNIA
COUNTY OF ALAMEDA } ss.

I, VICTORIA KEPPLER, do hereby declare:

That I am a resident of the County of Alameda, City of Oakland, California and my address is 208 Modoc.

That I have two daughters, ages six (6) and eight (8).

My family and I applied for aid under the AFDC program on January 19, 1972 and receive $235.00 per month.

That before going on aid my children attended the Chabot Public School near where we lived. One of my daughters has a hearing problem and had difficulty with school until she was enrolled at Chabot. Now she is getting special help and making excellent progress.

That because of an abrupt change in our living arrangement we were left without any income and without a place to live. This happened in the midst of the school term.

I was unable to find a decent place for my family to live within the Chabot School area, or even near it, that I could afford on the amount I get from welfare. We couldn't find a two-bedroom apartment for less than $200.00 per month, which would leave us with only $35.00 per month for all other needs like food and clothing.

I joined my family with another woman who is pregnant and on welfare. We found a house near the Chabot School that had room for all of us and that we could afford by combining our resources. The total rent is only $275.00 per month including utilities. We are able to live in a clean and decent house, with bedrooms and living space for all of us, with an ability to share childcare, like baby-sitting, all for less money than if we lived separately.

The Alameda County Welfare department informed me in late January, 1972, that neither my family nor the family we share the house with will be able to get food stamps

because we're not a "household", since we're not "related" to one another.

If we were living separately from the other family we would be eligible for food stamps. We would be able to purchase $88.00 worth of food for $64.00.

My friend and her child would otherwise be eligible for food stamps also and could get $60.00 of food stamps for $48.00.

Now neither family is eligible for food stamps.

It is clear to me that it is much more economical for us to share a house, but now we are being punished for being thrifty.

Without food stamps we will have difficulty making ends meet.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: 2/8/72

/s/ Victoria Keppler
VICTORIA KEPPLER

[Title Omitted in Printing]

[Filed March 30, 1972]

AFFIDAVIT OF SHEILAH ANN HEJNY

STATE OF NORTH CAROLINA }
COUNTY OF FORSYTH }

Sheilah Ann Hejny, being duly sworn, deposes and says:

1. I am a plaintiff in this lawsuit. I am 25 years old and reside at Route 3, Kernersville, Forsyth County, North Carolina.

2. My household consists of six persons: myself, my husband, David Lee Hejny, age 27, my three children, Robert Wayne, age 5, Shirley Jo, age 3, Tracy Leigh, age 2 and Sharon Sharp, age 20. Sharon Sharp is not related by blood or affinity to any member of my family.

3. Up until September 7, 1971, my family was living in Dallas, Texas. We lived next door to the Sharp Family and became acquainted with Sharon. Sharon had been in a children's home since age 7, returning to her mother at age 18. She lived with her mother about six months and then she was told to leave home on November 21, 1970. My family took her in as we felt she had emotional problems caused by her mother's rejection and other factors which we could help by offering her a home.

4. Sharon immediately became a member of the family. She baby-sat for my children when the need arose, and helped with the cooking and cleaning. My husband and I treated her as a family member, sometimes buying clothes for her and other personal items.

5. On September 7, 1971, we all moved to Winston-Salem,** North Carolina. On November 1, 1971 my husband was employed by an Electrical Company in High Point, North Carolina and worked in the plumbing-pipe laying division. The amount of hours he put in depended upon the weather, and during the months of November, December and January, he worked only two or three days a week, receiving $2.00 per hour.

** Winston-Salem and Kernersville are used interchangeably.

6. On January 24, 1972, my husband was transferred to Gaffney, South Carolina to lay pipe. His salary is $2.50 per hour, and the amount of hours still depends upon the weather. Since January 24th, he has not been able to put in a full week's work. He comes home on Saturday in a company truck and returns to South Carolina the next day.

During the latter part of January, our family received emergency food donations from churches and a health nurse suggested I apply for food stamps.

7. On or about the 1st of February, 1972, I applied for food stamps at the Forsyth County Department of Social Services. A week later, I started to participate in the program, spending $14.00 per month for a monthly coupon allotment of $144.00.

8. During the month of February, 1972, our family income was as follows:

a. My husband brought home about $90.00 per week.

b. Sharon Sharp earned about $20.00 per month babysitting for neighbors in the trailor park where we live.

c. I have not worked since coming to Winston-Salem because of the reason set forth in paragraph number 11.

9. During February of 1972, Sharon continued to be an integral part of our family, helping with the cooking, cleaning, babysitting for me when necessary and contributing her outside baby sitting earnings to our household expenses. I have not pushed her to get a job since I feel her continuing emotional problems prevent her from becoming gainfully employed on any permanent basis. Instead I am urging her to attend the local mental health clinic.

10. Since arriving in Winston-Salem, and in particular during the month of February, our family expenses were as follows:

a. Rent—$38.50 per week—this amount includes lights, gas and water and is for a furnished trailor.

For the past several weeks, our landlord has required us to pay $70.00 per week for rent as we had become over $200.00 behind. We are now $170.00 behind. (When my husband returns to his job on Sundays, he thus takes no money with him.)

b. We have no car, no telephone.

11. Our family financial condition is further worsened by the following medical problems:

a. Robert, age 5, has bronchial asthma. At present he is receiving free treatment from the County Health Department.

b. My daughter, Tracy, was born February 9, 1970 with an open spine (meningiocele). A week after birth she was operated on to remove a pouch of spinal fluid. This operation cost $6,000. The March of Dimes and our own efforts have reduced the present amount owing to $500.00.

i. Three months later, Tracy was hospitalized for pneumonia—cost $1,000.00—present amount owing $600.00.

ii. Six months later, Tracy turned blue from the waist down and the total bill, including cast-braces, was $600.00. We presently owe $300.00.

iii. Since coming to Winston-Salem, Tracy has been seen frequently by the County Health Department at no expense. On February 21, 1972, however, the clinic doctor referred her to a private hospital for neurological tests and a ears, nose and throat examination. She recently has been experiencing a constant nose bleed. We will have to assume these costs.

My concern for Tracy and the time necessary to care for her have delayed my plans to find a job; because of Tracy's condition, she is highly susceptible to disease.

c. On June 8, 1971, I had my gall bladder removed—cost $1,000.00 amount owing $800.00. In January of 1972, I had a tubal ligation financed by Family Planning. During both these occasions, Sharon assumed the major responsibility for the household duties and care of my children. Sharon has also provided necessary baby-sitting services while I have had to take my children for clinic visits.

d. My husband has an hereditary tumor disease, Von Ricklinhouser, (aortic insufficiency). The tumor was removed in 1964. My husband is not disabled because of this condition, but we expect problems to reoccur. My husband also has a heart valve that leaks, requiring his heart to work faster. In 1967, he was advised by a doctor to seek surgery, but no operation is contemplated at the present time.

e. Since coming to Winston-Salem, I have not been able to pay anything on the medical bills listed above, and continue to receive letters requesting payments.

12. On or about February 24, 1972, we received a letter

from the Forsyth County Department of Social Services requesting that we come into the office so our eligibility for March could be reviewed. As we had no transportation, on or about February 28, 1972 a caseworker came out, and after examining our situation, informed us we were no longer eligible for participation in the foodstamp program because of Sharon's presence in our home. We have received no written notice concerning the termination of our benefits, and have not received any food stamps for March.

13. The loss of food stamps has created a financial crisis in our household. At present our net weekly income is roughly $25.00. Sharon's realization that she is "responsible" for our no longer receiving benefits is adversely affecting her emotional health. I do not see how I can give my children, especially Tracy, the medical care they need.

14. If the new food stamp regulations allowed unrelated households to be eligible for food stamps, I would be in a position to provide my "family" with the basic necessities of life. Given expenses and deductions, our purchase requirement would have remained very low, and my family could have benefited greatly from the program. Based upon our February, 1972 certification, our family could have continued to pay only $14.00 for $144.00 worth of stamps.

Inscribed and sworn to before me this the 7th day of March, 1972.

/s/ Sheilah Ann Hejny
Affiant, SHEILAH ANN HEJNY

/s/ Vernal B. Gaston
Notary Public

My Commission Expires:
December 13, 1975

[Title Omitted in Printing]

[Filed March 30, 1972]

AFFIDAVIT OF DAVID S. DURRANT

STATE OF UTAH
COUNTY OF SALT LAKE }

DAVID S. DURRANT, being first duly sworn, upon oath, deposes and says:

1. I am a plaintiff in this lawsuit. I am 19 years old and reside at 84 "N" Street, Salt Lake City, Utah.

2. My household consists of two persons: David A. Kilmer and myself. We are not related individuals. I am 19 years of age and David A. Kilmer is 28 years of age.

3. Both David A. Kilmer and myself receive a minimum monthly income which would be insufficient for us to live upon in separate households. We chose to share one household in order to minimize our costs of living. We share the cost of rent, food, utilities, laundry and other household items and share the use of these items as well as using common kitchen facilities. I have found this arrangement to be economically and socially beneficial.

4. My income for the month of January, 1972, was approximately $100.00, which I earned doing odd jobs such as household repairs and remodeling in and about the Salt Lake City area.

5. David A. Kilmer had an income of approximately $70.00 per month which he earned doing odd jobs such as household repairs and remodeling in or about Salt Lake City during the month of January, 1972.

6. The anticipated total monthly expenses of our household for February, 1972, would have been approximately $200.00:

rent	$100
gas, water and sewer	40
electricity	5

laundry	5
transportation (oil & gas)	20
food	30
Total	200

In addition to these expenditures, we have costs for clothing, hygienic needs, and other personal incidentals.

7. I am a student at the University of Utah, being sent to that Institution to study by the Office of Rehabilitative Services as part of a rehabilitation program. In order to transport myself to school, I use an automobile, as there is limited public transportation available in the Salt Lake area and such public transportation as exists costs 50 cents to ride one way. My car is currently in bad mechanical condition, as it is in need of replacement tires and in the last month, I have had to replace the brake shoes, brake linings, brake seals, and transmission seals.

8. We have barely been able to meet our monthly living expenses. In order to meet our expenses, we have always cut out food. We know that on the monthly coupon allotments of food stamps put out by the Utah State Division of Family Services, based on our January income, for $42.00, we could have purchased $60.00 worth of food stamps, or for $31.50, we could have purchased $45.00 worth of food stamps, which would have allowed us to have lived much less marginally and provided us with a more adequate diet.

9. On or about January 10, 1972, David A. Kilmer and myself applied for food stamps, but were refused food stamp coupons by the Utah State Division of Family Services. This refusal, I was informed, was because the household of David A. Kilmer and myself was determined to be a household composed of unrelated individuals and therefore, we were not eligible and our application was denied. We appealed this denial and requested a fair hearing. This hearing was held on February 14, 1972, and the decision to deny food stamps was affirmed by the Order of the Hearing Examiner, who stated:

"Division regulations as listed in Vol. III, Section 2752.3 and U.S.D.A. regulations prohibit the issuance of food stamps on a strictly individual basis and to persons who are living together who are not related."

(a copy of which decision is attached hereto and marked as Exhibit A.)

10. The denial of food stamps seriously affects our household. We are unable to meet the high cost of living and still permit me to continue in school. Unless we buy less clothing or food for our household, we would be burdened with additional expenses that we cannot afford, if we hope to maintain a poor but healthy household.

11. If the new Food Stamp statute and regulations requiring that a food stamp household contain only related individuals were not in effect, our household would benefit from food stamps. As a two-member household under Table VI of Vol. III, Assistance Payments Manual of the Policy Manual of the Utah State Division of Family Services, Monthly Coupon Allotments and Variable Issuance Purchase Requirements, with an income of $170 to $189.00, we would be, for the purchase price of $42.00, permitted to buy $60.00 worth of food coupons, thereby saving $18.00, which would permit our unbalanced budget to come more nearly into balance and permit me to continue in school and live for the limited period of time during which time I am in school as part of a rehabilitation effort to permit me to become a self-supporting contributing member of society.

12. Under the provisions of Table II of Vol. III, Assistance Payments Manual of the Policy Manual of the Utah State Division of Family Services, which contains the standard budget or needs budget for the State of Utah, if I were living by myself, I would require for a decent standard of living the sum of $153.00 per month and would receive, if I applied for it, a welfare grant of $12.00 per month, as the maximum grant paid by the State of Utah for a single person is $112.00. For our two-person household, the need as set forth in the needs budget is $205.00.

/s/ David S. Durrant
DAVID S. DURRANT

Subscribed and sworn to before me this 9 day of March, 1972.

/s/ Jackie T. McCann
Notary Public
Residing at Salt Lake City, Utah

My Commission Expires:
1/15/75

BOARD OF FAMILY SERVICES OF THE STATE OF UTAH

FAIR HEARING IN THE INTEREST OF
DAVID DURRANT
DAVID KILMER

Hearing Order

The above entitled matter having been regularly heard before the hearing examiner of the Utah State Division of Family Services and proper notice having been given the claimant, and all of the facts, circumstances, and rights of the claimant having been duly considered by the State Board of The Division of Family Services:

NOW THEREFORE IT IS ORDERED:

1. The decision by the Region III office to deny the claimant's application for food stamps on the basis that two unrelated persons live together is hereby sustained.
2. Division regulations as listed in Vol. III Section 2752.3 and USDA regulations prohibit the issuance of food stamps on a strictly individual basis and to persons living together who are not related.
3. This decision shall be reviewed by the State Board of the Division of Family Services and may be appealed by writing to the Board at 231 East Fourth South, Salt Lake City, Utah 84111, within 30 days.

It is further ordered that a copy of this order be served upon the claimant by mailing thereof to him/her at his/her last known address, certified mail, return receipt requested. Dated this 14th day of February 1972.

BOARD OF FAMILY SERVICES

/s/ Richard Fowler
By: RICHARD FOWLER
Hearing Examiner

EXHIBIT A

(a copy of which decision is attached hereto and marked as Exhibit A.)

10. The denial of food stamps seriously affects our household. We are unable to meet the high cost of living and still permit me to continue in school. Unless we buy less clothing or food for our household, we would be burdened with additional expenses that we cannot afford, if we hope to maintain a poor but healthy household.

11. If the new Food Stamp statute and regulations requiring that a food stamp household contain only related individuals were not in effect, our household would benefit from food stamps. As a two-member household under Table VI of Vol. III, Assistance Payments Manual of the Policy Manual of the Utah State Division of Family Services, Monthly Coupon Allotments and Variable Issuance Purchase Requirements, with an income of $170 to $189.00, we would be, for the purchase price of $42.00, permitted to buy $60.00 worth of food coupons, thereby saving $18.00, which would permit our unbalanced budget to come more nearly into balance and permit me to continue in school and live for the limited period of time during which time I am in school as part of a rehabilitation effort to permit me to become a self-supporting contributing member of society.

12. Under the provisions of Table II of Vol. III, Assistance Payments Manual of the Policy Manual of the Utah State Division of Family Services, which contains the standard budget or needs budget for the State of Utah, if I were living by myself, I would require for a decent standard of living the sum of $153.00 per month and would receive, if I applied for it, a welfare grant of $12.00 per month, as the maximum grant paid by the State of Utah for a single person is $112.00. For our two-person household, the need as set forth in the needs budget is $205.00.

/s/ David S. Durrant
DAVID S. DURRANT

Subscribed and sworn to before me this 9 day of March, 1972.

/s/ Jackie T. McCann
Notary Public
Residing at Salt Lake City, Utah

My Commission Expires:
1/15/75

BOARD OF FAMILY SERVICES OF THE STATE OF UTAH

FAIR HEARING IN THE INTEREST OF DAVID DURRANT DAVID KILMER

Hearing Order

The above entitled matter having been regularly heard before the hearing examiner of the Utah State Division of Family Services and proper notice having been given the claimant, and all of the facts, circumstances, and rights of the claimant having been duly considered by the State Board of The Division of Family Services:

NOW THEREFORE IT IS ORDERED:

1. The decision by the Region III office to deny the claimant's application for food stamps on the basis that two unrelated persons live together is hereby sustained.
2. Division regulations as listed in Vol. III Section 2752.3 and USDA regulations prohibit the issuance of food stamps on a strictly individual basis and to persons living together who are not related.
3. This decision shall be reviewed by the State Board of the Division of Family Services and may be appealed by writing to the Board at 231 East Fourth South, Salt Lake City, Utah 84111, within 30 days.

It is further ordered that a copy of this order be served upon the claimant by mailing thereof to him/her at his/her last known address, certified mail, return receipt requested. Dated this 14th day of February 1972.

BOARD OF FAMILY SERVICES

/s/ Richard Fowler
By: RICHARD FOWLER
Hearing Examiner

EXHIBIT A

Hearing held February 11, 1972, Salt Lake City, Utah
Decision dated February 14, 1972
Richard Fowler, Hearing Examiner

I. Claimant's Petition:

The claimant requested the hearing to appeal a decision by the Region III office to deny his application for food stamps on the basis that he is living with a non-related person. The claimant pays an equal share of the costs of rent, utilities and food and states that food is prepared in common. He is residing with a friend in order to meet expenses while attending school. His tuition is met by the Office of Rehabilitation Services and the other member of the household is receiving on-the-job training under the G.I. Bill. The two persons are not related.

The claimants stated that they should not be denied food stamps due to the fact that there is a severe housing shortage in the Salt Lake City area and it is physically impossible for all persons in the community to have individual housing. In addition, both persons are attending school or job training at government expense. If the Federal and State Governments see fit to subsidize their training it would seem that the USDA is working at cross-purposes by seeking to prevent them from succeeding by denying food stamps. They stated that the USDA should define a commune as being a large group of people and not pass rules to limit food-stamps participation by small groups. They protest also the rule that stamps are issued on a household basis. Non-related persons with income should not be obliged to support persons with little or no income simply because they share living quarters.

II. Regional Office Response:

The representatives of the Region III office stated that the application was denied due to the fact that the two applicants were not related and were sharing common living quarters.

III. Findings of Fact:

Division regulations as listed in Vol. III Section 2752.3 and USDA regulations prohibit the issuance of food stamps

on a strictly individual basis and to persons living together who are not related.

IV. Decision:

The decision by the Region III office to deny the claimant's application for food stamps on the basis that two unrelated persons live together is hereby sustained.

[Title Omitted in Printing]

[Filed March 30, 1972]

Michael Hoffman, David McElyea, Deborah Jirel, Deborah Small and Michael Gaddy, being duly sworn, depose and say:

1. That they are plaintiffs in the above-captioned lawsuit. They make this affidavit upon their own knowledge, and each of them swears to those statements which pertain particularly to him and to those statements which pertain to the group as a whole.

2. The five affiants live together, as a household, at 727 Sims Street, Columbia, South Carolina.

3. Michael Gaddy is 24 years of age; Michael Hoffman is 20; Deborah Jirel is 18; Deborah Small is 18 and David McElyea is 17.

4. Deborah Jirel left her parents' home in St. Andrews, South Carolina, in June, 1971, following a long history of family discord. This discord centered around what Deborah believes to be her parents' inability to comprehend and tolerate her views on politics, economics and race. This lack of understanding resulted in an incompatible family situation which forced her to leave home. Deborah visits her parents about twice a month. Her parents have never offered, nor has Deborah asked for, financial assistance. On or about January 7, 1972, Deborah left her job as a food-preparer with a large, nationwide take-out food chain, because, when she asked permission to leave work due to illness, she was told that, if she left, she would be fired. Rather than be fired, she quit. She is presently seeking employment through the Youth Opportunity Center of Columbia, South Carolina.

5. Michael Hoffman left his parents' home in Marietta, Georgia, between three and four years ago. Michael has been declared an emancipated minor by the courts of the State of Georgia. He was asked to leave the family home by his mother. Michael's father died subsequent to his leaving home, and for that reason Michael's mother has never offered to support him, nor has he asked for any such help. Michael now converses with his mother by telephone

about once a month. Michael was asked to leave home because of family discord. This discord involved Michael's political, social and racial beliefs which his parents could neither understand nor accept. This friction resulted in an incompatible family situation and was the reason for his being asked to leave home. Michael is unemployed but is looking for work through the Youth Opportunity Center of Columbia, South Carolina, in addition to looking for work independent of that organization.

6. Deborah Small was asked to leave her mother's home in Brewer, Maine, in or about March, 1971. Her mother has never asked her to return, even though Deborah writes to her mother about once a month. Deborah's mother is divorced and is unable to send money for Deborah's support; Deborah has not asked her mother to support her since the family tie was severed. Deborah last worked on or about January 10, 1972. She was forced to quit her job when, having asked permission to leave her job for a short time in order to see her attorney, permission was denied. She quit because she was informed by her supervisor that, if she insisted upon leaving to see her attorney, she would be fired. Deborah is also currently seeking employment.

7. David McElyea left his parents' home in the Columbia area about mid-December, 1971. His parents never objected to his leaving, nor have they ever asked him to return. David has never been offered support by his parents since his leaving their home, nor has he asked for any such support. David last worked on or about January 10, 1972, when he quit his job as a cook. He was forced to quit because of constant harrassment from his supervisor. David believed that this harrassment was totally unjustified in that he felt that he was a good employee, with a good record, and an employee who gave every indication of enjoying his work. He is presently seeking employment and has been promised a position with a local textile firm if, and when, an opening occurs.

8. Michael Gaddy is a full-time student at the University of South Carolina and is majoring in music. Michael served in the United States Army, saw duty in Viet Nam and was honorably discharged in October, 1969. Neither his mother nor his father is financially able to provide money for his

support or education. He has never asked his parents for any such financial assistance.

9. The five affiants established a household in or about mid-December, 1971. They established this household for economic reasons—they could reduce expenses by living as a unit—and because of a personal affinity each for the other.

10. Although unrelated by either blood or marriage, affiants consider themselves to be a family unit. Because of their experiences with their respective natural families, affiants have endeavored to establish a family unit which affords the same kind of security, stability and protection as a biological family provides to its members. Affiants share all expenses. If one member of the unit is employed, such member would feel obliged to provide food, shelter, medical care and other necessities for the other members. When one member pays the monthly rent, for example, he does not seek, or expect, reimbursement. In fact when Michael Gaddy applied for admission to the University of South Carolina, he did not have sufficient funds to cover the cost of tuition, books and other expenses. The other members of the family contributed funds for these costs. None of the affiants wants or expects to be reimbursed. These funds were given out of a sense of affinity, or love, in order to help a family member attain what he desired. While expenses are shared, if one member has no money to contribute, he is not ostracized; there is no resentment. Witness to this is the fact that neither Michael Hoffman nor Michael Gaddy has worked since the formation of the family, and have, therefore, been unable to contribute equally with the other members, but who have, nevertheless, never been asked to leave or to obtain a job as a condition of family membership.

11. What affiants wish to stress most to this Court is that the relationship amongst the affiants is far deeper and stronger than the bonds between friends or between mere roommates and that affiants consider themselves a family, not merely for the purposes of this lawsuit, but for *all* purposes.

12. On or about January 12, 1972, affiants applied for food stamps at the Richland County (South Carolina) Food Stamp Office, as a household. Their application was denied solely because they were not related by either blood or marriage.

13. Affiants meet all other eligibility criteria: they have no income, are willing to work and are in need of assistance. Affiants' monthly expenses are as follows:

Rent	$75
Food	$120
Utility	$34
Telephone	$14
Laundry	$10
Car	$30

14. Affiants believe that the basis for denying them food stamps is discriminatory and violates their fundamental rights of freedom of association and freedom of expression.

15. Affiants have been informed by their attorneys, and believe, that each of them would be entitled to $32 worth of food stamps per month and would have to pay nothing for these stamps if each affiant lived alone. Affiants have been similarly informed that, if they were related by blood or marriage, they would be entitled to $128 worth of food stamps per month and would have to pay nothing for these stamps.

16. The denial of food stamps to persons in the same situation as the affiants means that such persons must deny themselves food and other items necessary to sustain life. The denial of food stamps to the affiants has placed them in an extremely precarious economic position. They have no income and have been forced to feed themselves and obtain other necessities through the generosity of neighbors and other friends.

/s/ Michael Hoffman
MICHAEL HOFFMAN

/s/ Michael Gaddy
MICHAEL GADDY

/s/ Deborah Jirel
DEBORAH JIREL

/s/ Deborah Small
DEBORAH SMALL

/s/ David McElyea
DAVID MCELYEA

Sworn to before me this 27th day of January, 1972.

/s/ Paula M. Macmillan (L.S.)
Notary Public for South Carolina
My Commission Expires: (11-17-79)

APPENDIX "A"

[to Memorandum of Law filed March 30, 1972]

STATE OF CALIFORNIA—HUMAN RELATIONS AGENCY

DEPARTMENT OF SOCIAL WELFARE
744 P Street
Sacramento 95814
November 15, 1971

Mr. Kenneth Schlossberg, Staff Director
Select Committee on Nutrition and Human Needs
Senate Annex
Washington, D. C. 20510

Dear Mr. Schlossberg:

This will reply to your November 9, 1971, telegram requesting a report on the Food Stamp Program. Our response will follow the same sequence as your questions.

When will new Plans of Operation be implemented?

The following time schedule has been set for implementing our new Plan of Operation by all California food stamp counties:

To implement no later than January 1, 1972

a. The new purchase requirements and allotment schedule for all certified households and new cases.
b. The new eligibility requirements for all new applicants, applying to recertifications as due subsequent to January 1, 1972, completing recertification of entire caseload by May 1, 1972.

To implement no later than April 1, 1972

a. Public Assistance Withholding method of stamp payment.
b. Variable Purchase requirements.

To implement no later than February 1, 1972

All other changes in the new Plan of Operation, including Quality Control and Outreach services.

Have you instituted new eligibility levels yet?

Subject to Food and Nutrition Service approval, all new eligibility standards and requirements have been instituted in our state's Food Stamp Manual of Program Policies, and will be effective January 1, 1972.

What do you expect to be the effective participation of the new levels? How many and what kind of persons will be brought into the program? How many and what kind of persons will be eliminated from the program?

There is no way to judge numbers effectively, but a small number of households will be made eligible for food stamps with the increase in the maximum adjusted income limits for households of four or more. This number may be balanced by the households made ineligible by the same new limits in the one to three person households. In addition, fewer items are considered as hardships deductions, which means that a given household's adjusted income may be higher under the new regulations. There is no large, recognizable group which will become eligible under the new regulations.

The "related household" limitations will eliminate many households from eligibility in the Food Stamp Program. It is my understanding that the Congressional intent of the new regulations are specifically aimed at the "hippies" and "hippie communes". Most people in this category can and will alter their living arrangements in order to remain eligible for food stamps. However, the AFDC mothers who try to raise their standard of living by sharing housing will be affected. They will not be able to utilize the altered living patterns in order to continue to be eligible without giving up their advantage of shared housing costs.

In California it is a common practice for the very poor to "move in" with friends during unemployment, or any type of crisis. Many of the migrant labor camps are so constructed that the people living there cannot be eligible on the basis of "related household". This section will eliminate a segment of the migrant workers who by definition are to be eligible for food stamps. We have found no way to "interpret" so these migrants in this type of camp can be eligible.

What other aspects of the new regulations as developed in your state's plan affect participation in the program?

Although the new basis of coupon issuance will slightly increase food stamp bonus values for participant households at the extremely low net income levels, it will more significantly decrease values and purchasing power of the still larger group of participant households in California who will fall within net income levels ranging from $130 monthly and up for single person households to $570 monthly and up for the 10-person households. The increased purchase requirements for these households (which include a high percentage of public assistance recipients), without a proportionate increase in their total stamp allotments, will adversely affect their program benefits by a progressive increase in loss of bonus values ranging from $2 to $4 for single person households, to from $37 to $39 for a 10-person household.

In addition to the loss of program benefits for these households, their subjection to a far more complicated and detailed application process will undoubtedly serve to further deter them from food stamp participation, particularly those at the maximum purchase requirement levels who stand to gain a monthly bonus benefit of only $6 for the one and two person households and $9 for the three and more person households.

The "tax dependent" restriction will eliminate many of the college students who now receive food stamps, and a sizeable percentage of the young AFDC families. There is no leeway for the legitimately emancipated minor who meets financial misfortune, whether married or single. It appears reasonable to exclude that person during the year he is being claimed as a tax dependent by another household, but being excluded for the year thereafter seems unreasonable.

I suggest the law should specifically exclude that college student who is receiving over half his support from a person outside his household (a student being supported by a parent living elsewhere) who can legally claim the student as a dependent. The exclusion should continue until the student no longer receives over half his support in such a manner.

How serious a problem is funding for your state and what effect will increased administrative costs have on your ability to operate the program?

Counties are considering the increased cost of administration very carefully. Several counties have indicated that they are weighing the possibilities of changing from food stamp to commodities, or of having no supplemental food program. New counties, just accepted and not yet operating, may re-evaluate their decision to come into this program.

Increased administrative costs include:

a. There is new federal reimbursement available for Fair Hearing officers, but no such reimbursement for county expenses in handling Fair Hearing problems. The larger counties who have one specific person handling Fair Hearings may be able to claim reimbursement, but not the small county who assigns this duty to an administrator as a supplemental duty. The Fair Hearings are expected to increase sharply since the new regulations also allow retroactive adjustments.

b. The new work registration will require considerable additional paperwork by each certification worker. While this is reimburseable at 62½%, the county will have to carry the remaining 37½%.

c. The "fixed basis" of income used in all OAS cases in one or two person households can no longer be used. Each of these budgets must now be computed individually. As above, the county must carry 37½% of this increased cost.

Counties are having the same difficulties in funding as other governmental jurisdictions. This expanded cost will not bring a greater income to the county. At this time, the applicant pays an average of 50¢ for every $1 of food stamps issued. This is bringing income into the community at the rate of 50¢ per $1 issued. But the county costs must be weighed against this increased community income. At the time that counties determine the cost of issuing stamps is equal to or above the increased monies brought in, then they must re-evaluate the benefits of the program to the

county. We may now have reached this point of re-evaluation.

"The Select Committee Would Appreciate Any Information You Can Provide Regarding Your Reaction to the New Regulations, Your Efforts to Implement and Make Them Workable, Your Discussions with the Department of Agriculture on the New Regulations, and Your View of Future Operations of the Food Stamp Program"

The department's reaction to the new regulations is similar to that of the other western states—mixed. The regulations seem to reflect a conflict of Congressional philosophy. Some elements such as the work registration and tax dependency requirements appear restrictive, while others such as Public Assistance Withholding and the Variable Purchase features provide more flexibility in the program. Also, this state has formerly been able to negotiate with Food and Nutrition Service on the interpretation of federal regulations. Now Food and Nutrition Service mandates the use of their own wording in the FNS Instruction 732-1.

The concept of national uniform policy for eligibility and certification is sound in theory. However, in day to day operations, uniform wording does not work for all of the states. The interpretation of rules for eligibility in California should not be the same as for the small southern rural states. The United States Department of Agriculture, however, does not provide for any flexibility for the states in the wording and interpretation of the regulations.

Lack of negotiation between FNS and a state like California causes hardship to the 36 counties responsible in our state for administering the program on a day to day basis. The continuing writing of FNS regulations without consistency between the Food Stamp Act and the Public Assistance titles of the Social Security Act, creates administrative problems and costs for county government. By some coordinative effort at the Congressional level, simplified provisions could take place which would result in a realistic approach to uniform income and resource standards.

As you can see in the attached letter, we have asked for a meeting with Mr. James Springfield, USDA Director, Food

Stamp Program, to discuss and hopefully resolve some of the issues we have raised with the USDA. It will be interesting to see how the USDA responds to our request.

With respect to the future of the program, we see the administrative costs of operating the program at the local level ever increasing. With the county fiscal situations as they are, I believe we are at the point where some counties are not able to absorb these increasing costs. Should the administrative costs continue to rise, it could mean some counties withdrawing from the Food Stamp Program and reverting to the Commodities program, particularly unless FNS enforces the same eligibility requirements for both programs. It is also conceivable that some counties might withdraw from the Food Stamp Program and not enter into the Commodities program. I believe administrative costs could be lowered by making the Food Stamp Program regulations the same as those of Public Assistance.

Thank you for giving us an opportunity to comment on the new food stamp regulations. If I can provide any additional comments or further clarification on any of these items, please let me know.

Sincerely,

/s/ Robert B. Carleson,
Director of Social Welfare
[illegible]

Deputy Director, Administration

[Title Omitted in Printing]

[Filed April 5, 1972]

DISTRICT OF COLUMBIA }
WASHINGTON, D. C. }

Edward J. Hekman, being first duly sworn on oath, deposes and says that:

1. I am Administrator of the Food and Nutrition Service of the United States Department of Agriculture. Under the general direction of the Assistant Secretary of Agriculture for Marketing and Consumer Services, I am responsible for the administration of the Food Stamp Program.

2. The purpose of this affidavit is to show that the issuance of a temporary restraining order in this case would have the effect of substantially changing existing criteria of eligibility for participation in the Food Stamp Program. Contentions similar to those of the plaintiffs were given full administrative consideration and were not adopted as more fully set forth in the statement of the Assistant Secretary of Agriculture for Marketing and Consumer Services which was published in the Federal Register on October 16, 1971 (36 F.R. 20145). The regulations of which plaintiffs now complain became effective on July 29, 1971, over eight months ago, and have been implemented in all but three states—none of which three is a state of residence of any of the plaintiffs.

3. On April 16, 1971, there was published in the Federal Register (36 F.R. 7240) a notice of proposed rule making which invited the comments, suggestions, or objections of interested persons with respect to the proposed revision of the regulations governing the Food Stamp Program. The revision of the regulations was necessitated by the amendments to the Food Stamp Act of 1964 (7 U.S.C. 2011-2025) which were enacted by Public Law 91-671 (84 Stat. 2048), approved January 11, 1971. Among those amendments was the amendment in issue which modified the statutory definition of "household" limiting it to "a group of related individuals . . . or nonrelated individuals over age 60. . . ." Thus, the proposed regulations included language to effectuate this change in the enabling legislation by making ineligi-

ble for the program any household in which all of the members were less than 60 years old and were not related to each other.

4. Numerous comments concerning this proposal were received. However, it was concluded that in order to carry out the intent of the legislation, the regulation to be promulgated would have to be substantially in the form of that issued on July 29, 1971. Any method of handling groups of persons who were living together and were under 60 years of age on any basis other than that prescribed in the regulations could well result in the eligibility for the program of communal households which clearly the Congress intended to exclude from participation in the program.

5. Since publication of the revised program regulations on July 29, 1971, the Food and Nutrition Service has worked diligently, along with the agencies of the several States responsible for the administration of the program in such States to implement the various program changes, including the revised eligibility standards, required by the 1971 amendments to the Food Stamp Act of 1964. Some of the States implemented the revised eligibility standards as long ago as November 1971. All but three of the States participating in the program have now put such standards into effect. The attached Exhibit 1 shows the status of each State in this respect.

6. The change challenged here is only one of a number of changes in the program which have been made by nearly all of the participating States to bring program operations into conformance with the substantially amended statute and revised regulations. The issuance of a Temporary Restraining Order would disrupt the orderly local administration of the program in each of the States involved without there having been any consideration of the merits of the litigation.

/s/ Edward J. Heckman
Administrator

Subscribed and sworn to before me a Notary Public in and for the District of Columbia this 4th day of April, 1972.

/s/ Donneta S. Dorsey
Notary Public
District of Columbia

My Commission Expires April 30, 1974

[Title Omitted in Printing]

[Filed April 5, 1972]

DISTRICT OF COLUMBIA }
WASHINGTON, D. C. }

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/s/ Edward J. Heckman
Administrator

Subscribed and sworn to before me a Notary Public in and for the District of Columbia this 4th day of April, 1972.

/s/ Donneta S. Dorsey
Notary Public
District of Columbia

My Commission Expires April 30, 1974

Schedule of Implementation of Revised Eligibility Requirements by State Agencies

STATE	DATE
Alabama	April 1972
Alaska	January 1972
Arizona	January 1972
Arkansas	January 1972
California *	January 1972
Colorado	December 1971
Connecticut	Proposed May 1972
District of Columbia	March 1972
Florida	December 1971
Georgia	January 1972
Hawaii	December 1971
Idaho	April 1972
Illinois	April 1972
Indiana	February 1972
Iowa	March 1972
Kansas	February 1972
Kentucky	March 1972
Louisiana	January 1972
Maine	January 1972
Maryland	January 1972
Massachusetts	April 1972
Michigan	April 1972
Minnesota	April 1972
Mississippi	January 1972
Missouri	March 1972
Montana	January 1972
Nebraska	December 1971
New Jersey	April 1972
New Mexico	April 1972
New York	April 1972
North Carolina	March 1972
North Dakota	January 1972
Ohio	April 1972
Oregon	Proposed May 1972
Pennsylvania	March 1972
Rhode Island	April 1972
South Carolina	January 1972
South Dakota	November 1971

STATE	DATE
Tennessee	January 1972
Texas	April 1972
Utah	December 1971
Vermont	Proposed May 1972
Virginia	January 1972
Washington	April 1972
West Virginia	November 1971
Wisconsin	December 1971
Wyoming	March 1972

* Some California counties began implementation in January; statewide implementation was completed by April 1, 1972.

[Filed April 6, 1972]

James F. Davey, *Clerk*

[Title Omitted in Printing]

TEMPORARY RESTRAINING ORDER

After reading the complaint, affidavits and memorandum of law, the Court, pursuant to 28 U.S.C. § 2284(3), ORDERS AND DIRECTS:

That the defendants, their agents, employees and successors in office, are temporarily enjoined from denying, or causing to be denied, food stamp eligibility to the plaintiffs, and all other impoverished persons residing in households in which everyone is not related to one another, on the basis that all members in plaintiffs' and other persons' households are not related to one another.

That the defendants shall immediately inform the States that persons shall not be denied food stamps on the basis that unrelated people reside in a household. Certification shall be accomplished on the same household basis as had been previously in effect prior to the implementation of the "unrelated household" provision.

That plaintiffs file a bond for the payment of costs and damages as may be suffered by any party who is found to have been wrongfully or unlawfully restrained herein, in the amount of, or security equivalent to, One ($1.00) Dollar.

That the United States Marshall shall serve a copy of this Order forthwith upon the defendants.

This order shall remain in effect until a hearing and determination by the three-judge court.

/s/ Jno. Lewis Smith, Jr.
United States District Judge

10:45 A.M.
April 6, 1972

A True Copy
James F. Davey, *Clerk*
By Lemiel Patterson
Deputy Clerk

Injunction
Undertaking of pltf for $1.00 cash
approved and filed 4-6 1972
James F. Davey, *Clerk*
By Lemiel Patterson, *Deputy Clerk*

[Title Omitted in Printing]

[Filed April 14, 1972]

MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

COMES Now the defendants by their attorneys, the undersigned attorneys and respectfully moves this court to dismiss this action or in the Alternative for Summary Judgment on the grounds that there is no genuine issue as to any material fact and defendants are entitled to judgment as a matter of law.

In support of this motion, the court is respectfully referred to the affidavit of Edward J. Heckman, previously filed in this case, which is incorporated herein and made a part hereof together with defendants' Memorandum of Points and Authorities in support of defendants' Motion to Dismiss or in the Alternative for Summary Judgment.

Respectfully submitted,

/s/

L. PATRICK GRAY, III
Assistant Attorney General

/s/

HAROLD H. TITUS, JR.
United States Attorney

/s/

HARLAND F. LEATHERS

/s/

PETER J. P. BRICKFIELD
Attorneys
Department of Justice

[Title Omitted in Printing]

[Filed April 14, 1972]

STATEMENT OF MATERIAL FACTS AS TO WHICH DEFENDANTS' CONTEND THERE IS NO GENUINE ISSUE

1. The Food Stamp Act (7 U.S.C. 2011 *et seq.*) of 1964 establish the Food Stamp Program to permit those households with low incomes to receive a greater share of the Nation's food abundance.

2. Eligibility for food stamps is and always has been on a "household" basis.

3. On January 11, 1971, the definition of "household" within the meaning of the Food Stamp Program was changed by statute. The new definition defined a household as being *inter ailia* "a group of related individuals."

4. On July 1971, regulations were promulgated which implemented the new definition of household. These regulations have been implemented in all but three states.

5. Contentions such as those put forth by plaintiffs herein with respect to the regulations were given administrative consideration but not adopted because the Department of Agriculture determined that the handling of groups of individuals who were living together and under 60 on any basis other than those proscribed in the regulation would be contra to the amendments in that it would result in eligibility for communal households.

6. Plaintiffs allege that they are groups of individuals who are needy and reside in Florida, California, North Carolina, South Carolina and Utah.

7. Defendants are the Department of Agriculture and the officials thereof who are currently responsible for the administration of the Food Stamp Program.

Respectfully submitted,

/s/

L. PATRICK GRAY, III
Assistant Attorney General

/s/

HAROLD H. TITUS, JR.
United States Attorney

/s/

HARLAND F. LEATHERS

/s/

PETER J. P. BRICKFIELD
Attorneys
Department of Justice

[Title Omitted in Printing]

[Filed April 19, 1972]

CROSS MOTION FOR SUMMARY JUDGMENT

Plaintiffs, pursuant to Rule 56 of the Federal Rules of Civil Procedure, upon their Complaint, their affidavits (filed with the temporary restraining order and preliminary injunction motions), their memorandum (in support of a temporary restraining order and preliminary injunction), and the oral argument presented in open Court, respectfully cross move for a summary judgment.

In support thereof, plaintiffs would show this Court that there are no material issues of fact in controversy in this litigation. Since the defendants have filed a motion for summary judgment, and since neither the plaintiffs nor the defendants have any disagreement on the facts in this case, a summary judgment is appropriate.

Respectfully submitted,

/s/ Ronald F. Pollack
RONALD F. POLLACK
Center on Social Welfare Policy and Law
401 West 117th Street
New York, New York 10027
(212) 280-4112

/s/ Roger Schwartz
ROGER SCHWARTZ
401 West 117th Street
New York, New York 10027

Local Counsel:

John R. Kramer/R.P.
JOHN R. KRAMER
Georgetown Law Center
600 New Jersey Avenue, N.W.
Washington, D.C. 20002
(202) 624-8318

The Opinion and Judgment of the District Court are printed at Pet. App. A and B.

The Notice of Appeal is printed at Pet. App. C.

SUPREME COURT OF THE UNITED STATES

No. 72-534

UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL.,
APPELLANTS,

v.

JACINTA MORENO, ET AL.

APPEAL from the United States District Court for the District of Columbia.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

DECEMBER 4, 1972

☆ U.S. Government Printing Office: 1973—493-204/460

INDEX

CITATIONS

Cases:

Constitution, statute and regulations:

In the Supreme Court of the United States

OCTOBER TERM, 1972

No.

UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL., APPELLANTS

v.

JACINTA MORENO, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the three-judge district court (App. A, *infra*) is not yet reported.

JURISDICTION

The judgment of the three-judge district court (App. B, *infra*) was entered on May 26, 1972. A notice of appeal to this Court (App. C, *infra*) was filed on June 23, 1972. On August 16, 1972, Mr.

Justice Rehnquist extended the time for docketing the appeal to and including October 3, 1972. The jurisdiction of this Court is conferred by 28 U.S.C. 1252 and 1253.

QUESTION PRESENTED

Whether the Food Stamp Act violates the Due Process Clause of the Fifth Amendment by excluding from eligibility households that contain persons who are not related to one another.

STATUTE AND REGULATIONS INVOLVED

Section 3(e) of the Food Stamp Act of 1964, 7 U.S.C. 2012(e), as amended by Section 2(a) of P.L. 91-671, 84 Stat. 2048, provides:

> The term "household" shall mean a group of related individuals (including legally adopted children and legally assigned foster children) or non-related individuals over age 60 who are not residents of an institution or boarding house, but are living as one economic unit sharing common cooking facilities and for whom food is customarily purchased in common. The term "household" shall also mean (1) a single individual living alone who has cooking facilities and who purchases and prepares food for home consumption, or (2) an elderly person who meets the requirements of section 2019(h) of this title.

7 C.F.R. 270.2, provides in pertinent part:

> (b) "Affinity" means the relationship which one spouse because of marriage has to the blood

relatives of the other. Such a relationship once existing is not destroyed for program purposes by divorce or death of a spouse.

* * * * *

(jj) "Household" means a group of persons, excluding roomers, boarders, and unrelated live-in attendants necessary for medical, housekeeping, or child care reasons, who are not residents of an institution or boarding house, and who are living as one economic unit sharing common cooking facilities and for whom food is customarily purchased in common: *Provided*, That:

(1) When all persons in the group are under 60 years of age, they are all related to each other; and

(2) When more than one of the persons in the group is under 60 years of age, and one or more other persons in the group is 60 years of age or older, each of the persons under 60 years of age is related to each other or to at least one of the persons who is 60 years of age or older. It shall also mean (i) a single individual living alone who purchases and prepares food for home consumption, or (ii) an elderly person as defined in this section, and his spouse.

* * * * *

(rr) "Related" means related by blood, affinity, or through a legal relationship sanctioned by State law. Persons shall also be considered related for purposes of the program if they are (1) a man and woman living as man and wife, and accepted as such by the community in which they live, or (2) legally adopted children, legally assigned foster children, or other children under

the age of 18, when an adult household member (18 years of age or older) acts in loco parentis to such children.

STATEMENT

This action was instituted in the district court to enjoin enforcement of the 1971 amendment [1] to Section 3(e) of the Food Stamp Act of 1964, 7 U.S.C. 2012(e), which restricted eligibility for food stamps, insofar as is here relevant, to households of "related individuals." [2] Appellees alleged that, while they otherwise satisfied the eligibility provisions of the Act, they were denied food stamps pursuant to that amendment because they each lived in a household containing unrelated individuals. A three-judge district court was convened pursuant to 28 U.S.C. 2282 and 2284. Upon cross-motions for summary judgment, the court held that Section 3(e), as amended, was invalid under the Due Process Clause of the Fifth Amendment and enjoined the government from denying food stamp eligibilty on the basis of the 1971 amendment.

Under the Food Stamp Act of 1964, 7 U.S.C. 2011-2025, as amended, the Food and Nutrition Service of the Department of Agriculture ("FNS") administers a food stamp program under which, at the request of the States, low-income households are is-

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[1] Section 2(a) of P.L. 91-671, 84 Stat. 2048.

[2] Appellees alternatively sought to enjoin enforcement of the implementing regulation, 7 C.F.R. 270.2(jj), on the ground that it was in conflict with the statute.

sued coupon allotments enabling them to obtain a nutritionally adequate diet at a reasonable cost to such households, with the federal government paying for the balance or bonus portion. 7 U.S.C. 2013(a), 2016(a) and 2025(a); 7 C.F.R. 270.3(a). See also the declaration of policy in 7 U.S.C. 2011. The amount such a household pays toward the purchase of food stamps is determined by FNS on the basis of a sliding scale related to the household's income. 7 U.S.C. 2016(b); 7 C.F.R. 271.5.

Eligibility for food stamps is determined in all cases on a "household" basis. 7 C.F.R. 271.3(a). Insofar as is here relevant, Section 3(e) of the Act, as amended in 1971, defines "household" as "a group of related individuals * * * who are * * * living as one economic unit sharing common cooking facilities and for whom food is customarily purchased in common." 7 U.S.C. 2012(e), as amended by Section 2(a) of P.L. 91-671, 84 Stat. 2048.

Prior to the 1971 amendment, Section 3(e) had not excluded groups of non-related individuals from the definition of an eligible household. Section 3(e), P.L. 88-525, 78 Stat. 703. The principal effect of the 1971 amendment was to exclude such groups from the definition of "household" and thus from coverage by the Act.[5]

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[5] The amendment did not affect certain groups of non-related individuals over 60 years of age.

The legislative history of the amendment reflects a Congressional purpose to withhold food stamps from "communal

An implementing regulation of the Secretary of Agriculture has construed the new definition of "household" as requiring that all persons in the group be "related to each other." 7 C.F.R. 270.2 (jj) (1).[4] It follows, therefore, that a group containing two or more individuals unrelated to one another is ineligible for food stamps under the 1971 amendment. Each of the appellees in the present case lives in a household which is ineligible to receive food stamps

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'families' of unrelated individuals" (H. Rep. No. 91-1793, 91st Cong., 2d Sess., p. 8), such as "hippy communes" (116 Cong. Rec. 44431, 44439).

A similar amendment proposed earlier by Congressman Foley would have excluded from eligibility households of six or more persons where no more than two persons therein were related. 116 Cong. Rec. 41998. That proposal was made in response to "some concern expressed about utilization of the program by groups of college students enrolled in fraternities or other collections of essentially unrelated individuals who voluntarily chose to cohabit and live off food stamps." 116 Cong. Rec. 42003.

[4] If a household contains more than one person under 60 years of age and at least one person over 60, the regulation requires that "each of the persons under 60 years of age [be] related to each other or to at least one of the persons who is 60 years of age or older." 7 C.F.R. 270.2(jj)(2). Persons are "related" for purposes of the Act if they are "related by blood, affinity [*i.e.*, through one's spouse] or through a legal relationship sanctioned by state law." 7 C.F.R. 270.2(rr) and (b). In addition, persons are related "if they are (1) a man and woman living as man and wife, and accepted as such by the community in which they live, or (2) legally adopted children, legally assigned foster children, or other children under the age of 18, when an adult household member (18 years of age or older) acts in loco parentis to such children." 7 C.F.R. 270.2 (rr).

due solely to the fact that it contains non-related individuals.[5]

The district court held that the Secretary's implementing regulation, construing the Act as requiring that all individuals in a group be related in order for the group or any of its members to qualify for food stamps, was "well within the bounds of the legislative plan" (App. A, *infra*, at p. 17). It ruled, however, that the 1971 amendment created an impermissible discrimination against persons living in households containing non-related individuals, in violation of the Due Process Clause of the Fifth Amendment. The court stated that the challenged classification was not relevant to the express purposes of the Act (*i.e.*, the improvement of the agricultural economy and the alleviation of hunger; see 7 U.S.C. 2011), and it was unable to perceive a reasonable legislative basis for that classification.[6]

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[5] Some of the appellees represent family households which are ineligible solely because they also include an individual not related to the members of the family—in one case a 56-year old diabetic, in another case the 20-year old daughter of a next-door neighbor—for whom the family provides care or support. See App. A, *infra*, at pp. 13-14, n. 4.

[6] The only possible legislative purpose fully considered by the court was that of fostering morality through discouraging unconventional living arrangements. The court viewed such a purpose as being itself constitutionally doubtful under *Griswold* v. *Connecticut*, 381 U.S. 479, *Stanley* v. *Georgia*, 394 U.S. 557, and *Eisenstadt* v. *Baird*, 405 U.S. 438. Assuming such a purpose, however, the the court concluded that the 1971 amendment was nevertheless unconstitutionally overbroad.

Judgment was accordingly entered enjoining the government from denying food stamp eligibility to appellees and "all other persons otherwise eligible, by reason of the fact that they live in households which contain one or more unrelated individuals" (App. B, *infra*, at p. 25).

THE QUESTION IS SUBSTANTIAL

The court below held unconstitutional a significant provision of a major Act of Congress. In doing so, the court erroneously overlooked the reasonable legislative basis for that provision. Plenary review by this Court is warranted in these circumstances.

The classification of beneficiaries in the Food Stamp Act, as in other public welfare statutes, does not offend the Constitution if it has "some 'reasonable basis'." *Dandridge* v. *Williams*, 397 U.S. 471, 485. See also, *Richardson* v. *Belcher*, 404 U.S. 78; *Jefferson* v. *Hackney*, 406 U.S. 535. Under the "reasonable basis" test, a statutory classification " 'will not be set aside if any state of facts reasonably may be conceived to justify it'." *Dandridge* v. *Williams*, *supra*, 397 U.S. at 485. And, "it is, of course, constitutionally irrelevant whether [the] reasoning [sustaining the statute] in fact underlay the legislative decision * * * ." *Flemming* v. *Nestor*, 363 U.S. 603, 612. In addition, in the area of social welfare "[a] legislature may address a problem 'one step at a time,' or even 'select one phase of one field and apply a remedy there, neglecting the others'." *Jefferson* v. *Hackney*, *supra*, 406 U.S. at 546.

In light of these principles, we submit that the classification established by Section 3(e) of the Act, as amended, is valid. While the court chose to focus upon a purpose to "foster morality" as the only possible justification for the statute—and found that justification inadequate—it overlooked a number of other considerations which sustain the statute under the "reasonable basis" test.

Congress was entitled to address itself primarily to the needs of poor families, elderly persons, and single individuals.[7] Congress could reasonably assume that those classes contain the largest numbers of persons with the greatest need for food stamps and that they represent relatively more stable living units than do groups of unrelated individuals. The latter consideration is significant for purposes of administering the program, since there is a continuing need to certify household eligibility on a periodic basis. See 7 C.F.R. 271.3 and 4. Congress was also entitled to assume that groups of unrelated persons under 60 years of age may, more often than other households, contain individuals who abuse the program by remaining voluntarily poor.[8]

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[7] It makes no difference that the present classification reflects, in effect, a curtailment of the program. See, *e.g.*, *Richardson* v. *Belcher*, *supra*, upholding a 1965 amendment to the Social Security Act which established a new offset against the disability benefits of one particular class of beneficiaries.

[8] That Congress was concerned with the problem of the voluntary poor is clear from Congressman Foley's discussion of his proposed amendment. See n. 3, *supra*. In addition, the reference to "hippie communes" in the legis-

It follows therefore that the 1971 amendment satisfies the requirements of the Due Process Clause. That is true, of course, even though it may operate to withhold food stamps from some needy persons. For, as this Court stated in *Dandridge* v. *Williams*, *supra*, 397 U.S. at 485 (emphasis added):

> If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or *because in practice it results in some inequality.* * * *"

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lative history (*supra*, n. 3) was undoubtedly a manifestation of that same concern.

While the court below noted that the statute already safeguards against claims of the voluntary poor, by requiring persons between 18 and 65 to register for and accept work (7 U.S.C. 2014(c)), the difficulties in effective enforcement of that provision among large numbers of the affected younger persons justify the enactment of an additional safeguard.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

HARLINGTON WOOD, JR.,
Assistant Attorney General.

ALAN S. ROSENTHAL,
WILLIAM KANTER,
Attorneys.

OCTOBER 1972.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Filed May 26, 1972, James F. Davey, Clerk]

Civil Action No. 615-72

JACINTO MORENO, ET AL., PLAINTIFFS

vs.

THE UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL., DEFENDANTS

OPINION

Before MCGOWAN, *Circuit Judge*, and SMITH and ROBINSON, *District Judges*.

MCGOWAN, *Circuit Judge*: Since the establishment of the food stamp program in 1964 eligibility for participation has been determined on a "household" basis. Initially, the term "household" was defined as "a group of *related or non-related* individuals, who are not residents of an institution or a boarding house, but are living as one economic unit sharing common cooking facilities and for whom food is customarily purchased in common."[1] (emphasis added). In January, 1971, however, Congress redefined "household" so as to include only groups of *related*

[1] 78 Stat. 703 § 3(e) (1964). The original act further provided that "[t]he term 'household' shall also mean a single individual living alone who has cooking facilities and who purchases and prepares food for home consumption." *Id.*

individuals.[2] Pursuant to this amendment, the Secretary of Agriculture, on July 29, 1971, promulgated regulations, 7 C.F.R. §§ 270.2(jj) and 271.3(a), which render ineligible a group of persons unless "they are all related to each other."[3]

There is little legislative history to illuminate the 1971 provision, since it first materialized, bare of committee consideration, during a conference committee's consideration of differing House and Senate bills. Its purpose, apparently, was to deny food stamps to "hippy" communes. *See* 116 CONG. REC. 43325-27, 44430-32 (1970).

Plaintiffs are five groups of persons who allege that, although they satisfy the income eligibility standards, they have been denied federal food assistance because the persons in each group are not "all related to each other."[4] They bring a class action

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[2] 7 U.S.C. § 2012(e), as amended, provides:

> The term "household" shall mean a group of related individuals (including legally adopted children and legally assigned foster children) or non-related individuals over age 60 who are not residents of an institution or boarding house, but are living as one economic unit sharing common cooking facilities and for whom food is customarily purchased in common. The term "household" shall also mean (1) a single individual living alone who has cooking facilities and who purchases and prepares food for home consumption, or (2) an elderly person who meets the requirements of section 2019(h) of this title.

[3] There is an exception, not here relevant, concerning households with individuals over 60 years of age.

[4] Several of the five groups of plaintiffs would appear not to be "hippies" under conventional notions. Plaintiff Sheliah Ann Henly, for example, lives with her husband, their three children, and one Sharon Sharp, who is twenty years old and

against the Department of Agriculture, its Secretary and two other departmental officials, seeking declaratory and injunctive relief against the enforcement of the 1971 amendment and its implementing regulations.

On April 6, 1972, a single district judge issued a temporary restraining order enjoining defendants "from denying, or causing to be denied, food stamp eligibility to the plaintiffs, and all other impoverished persons residing in households in which everyone is not related to one another, on the basis that all members in plaintiffs' and other persons' households are not related to one another." He also requested the convening of a three-judge District Court under 28 U.S.C. §§ 2282 and 2284. That was done, and the matter came on for hearing on plaintiffs' motion for a preliminary injunction and defendants' motion for summary judgment.[5] At that hearing, counsel for plaintiffs represented to us that he was prepared to have the merits of the complaint determined at this time, and orally moved for summary judgment. We grant that motion.[6]

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unrelated to any of the Henjys. It is alleged that the Henjy family has cared for Sharon since November, 1970, when Sharon's mother, who was a next door neighbor of the family, forced the girl to leave home.

Plaintiff Jacinta Moreno, to take another example, is a 56-year old diabetic who allegedly requires special food and medical care, and who lives with a Mrs. Sanchez and the latter's three children. Mrs. Sanchez helps to care for plaintiff, and the two share living expenses.

[5] Pursuant to 28 U.S.C. § 2284(3), the temporary restraining order has remained in effect pending further action by this court.

[6] At the hearing before us, counsel for defendants stated that, if his motion was denied, he would have evidence to

I

As a preliminary issue, defendants question the jurisdiction of a federal district court to entertain the complaint. Plaintiffs contend that jurisdiction can be founded on four separate sections of the Federal Judicial Code—28 U.S.C. §§ 1331, 1332, 1337, and 1361—as well as on the Administrative Procedure Act, 5 U.S.C. § 702. We find at least one of these provisions clearly sufficient, namely, 28 U.S.C. § 1337, which grants to the district courts "original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce . . . ."[7]

Under Section 1337, "it is not requisite that the commerce clause be the exclusive source of Federal power; it suffices that it be a significant one." *Murphy* v. *Colonial Federal Savings and Loan Association*, 388 F.2d 609, 615 (2d Cir. 1967). In addition to the alleviation of hunger and malnutrition, a major congressional purpose in establishing the food stamp program was to "strengthen our agricultural economy, as well as [to] result in more orderly marketing and distribution of food."[8] Given that pur-

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produce at trial. Although pressed by the court to do so, he did not, however, enlighten us as to the nature of that evidence, nor was he able to identify any disputed factual issues which were required to be explored and resolved. Neither are we able to discern any such issues necessitating further proceedings.

[7] In resting our jurisdiction on Section 1337, we are not to be understood as either reaching or pasing upon the availability of any of the other alleged jurisdictional bases.

[8] 7 U.S.C. § 2011. *See also* the preamble to 78 Stat. 703 (1964); 7 U.S.C. §§ 2012(b) and 2019(a); H.R. Rep. No. 1228, 88th Cong., 2d Sess. (1964).

pose, it is clear that the Commerce Clause was a "significant source of Federal power" behind the Food Stamp Act, and that this action, "arising under" that act, is properly within the jurisdiction of this court.

II

We turn to the merits of plaintiffs' claims that (1) the regulations which have been issued by the Secretary of Agriculture are patently beyond the scope of the authority conferred upon him by the statute, and (2) the statute itself is invalid as violative of the First and Fifth Amendments.

As to the first of these contentions, we cannot agree with plaintiffs that the regulation denying eligibility to a group of persons unless "they are all related to each other" is in conflict with the statute. The Secretary appears to have taken the view that the term "household" necessarily connotes an indivisible unit, *i.e.*, that it includes *all* of the persons who share a given set of cooking facilities. Plaintiffs assert that, unless an alternative view is taken that an eligible household can consist of less than all the persons who share a kitchen, thereby making food stamps available to the related members of the group, the regulation is in conflict with the statute.[9] We do not think that the 1971 amendment forecloses the Secretary's construction of it. In fact, given the congressional reference to persons "living as one economic unit sharing common cooking facilities and for

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[9] As plaintiffs point out, the effect of their prevailing on this point would be to provide partial relief to certain of their groups but not to all, *i.e.*, a group consisting of five related members and one non-related person could receive food stamps for a household of five.

whom food is customarily purchased in common," 17 U.S.C. § 2012(e), the Secretary's approach seems well within the bounds of the legislative plan.

Turning to plaintiffs' constitutional challenge, we find the case appropriate for the application of traditional equal protection analysis.[10] As noted above, the stated congressional purposes in enacting the food stamp program are two in number: The improvement of the agricultural economy, and the alleviation of hunger and malnutrition. The challenged statutory classification (households of related persons versus households with one or more unrelated persons) is, however, irrelevant to both of those purposes. The relationships among persons constituting one economic unit and sharing cooking facilities have nothing to do with their abilities to stimulate the agricultural economy by purchasing farm surpluses, or with their personal nutritional requirements.

Since the statutory classification is not relevant to the stated purposes of the act, it is invalid under the equal protection clause, *unless* it is justifiable by reference to an independent purpose which a court may think it proper to impute to Congress. *See Developments in the Law—Equal Protection*, 82 HARV. L. R. 1065, 1077 (1969); *United States* v. *Hamilton*, —— F.2d —— (D.C. Cir. No. 71-1148, decided April 6, 1972). In this case, the only independent purpose which has been or might be advanced is the fostering of morality.[11] Congress, it

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[10] The equal protection clause of the Fourteenth Amendment is applicable to the federal government through the medium of the Fifth. *See* Bolling v. Sharpe, 347 U.S. 497 (1954).

[11] A purpose to discriminate against hippies cannot, in and of itself and without reference to the protection of morals or similar considerations in the public interest, justify the 1971 amendment. *See* Parr v. Municipal Court, 3 Cal. 3d

might be thought, denied federal food assistance to hippy communes in an attempt to combat the unconventional living arrangements popularly associated with them.[13] Defendants, citing the general rule that, in the field of economic and social legislation, judges should exercise their ingenuities to the utmost in order to save a statute against constitutional attack, would presumably have us ascribe such a purpose to Congress. For two reasons, however, we decline to do so.

First, interpreting the amendment as an attempt to regulate morality would raise serious constitutional questions. While Congress may have power to legislate against its conception of immorality in some contexts, *see Caminetti* v. *United States*, 242 U.S. 470 (1917) (interstate commerce), its power to do so at the level at which this statutory provision operates—in the household—is doubtful at best. Recent Supreme Court decisions make it clear that even the states, which possess a general police power not granted to Congress, cannot in the name of morality infringe the rights to privacy and freedom of association *in the home*. *Griswold* v. *Connecticut*, 381 U.S. 479 (1965); *Stanley* v. *Georgia*, 394 U.S. 557

861, 479 P.2d 853 (1971). In order to qualify as "legitimate" under the equal protection clause, a legislative purpose must arguably be related to the improvement of the general welfare. *See Developments in the Law, supra* at 1081. The mere intent to harm a politically unpopular group will not suffice.

[13] The advancement of the work ethic is not the reason for the discrimination against communes in § 2012(e), since that purpose is accomplished through § 2014(c). The latter section imposes, as a condition of eligibility to participate in the food stamp program, an obligation upon all able-bodied adults to register, and to be available, for employment.

(1969); *Eisenstadt* v. *Baird*, 40 U.S.L.W. 4303 (1972).

The visible conflict with fundamental personal freedoms operates to remove this case from the reach of the general rule regarding economic and social legislation. In *Dandridge* v. *Williams*, 397 U.S. 471 (1970), a case cited by defendants as reaffirming the rule, the Supreme Court was careful to note that the statute there challenged did not affect "freedoms guaranteed by the Bill of Rights," and to indicate that its validity might have been suspect if it had. 397 U.S. at 484. Moreover, it is not the field occupied by the larger enactment which should be controlling, but rather the purpose and effect of the particular provision at issue. Here, although the Food Stamp Act is in the social and economic field, the challenged classification directly impinges on First Amendment freedoms; and the hypothesized purpose—the fostering of morality—is not "social and economic" in the traditional sense.

In short, while we would normally feel constrained to impute to Congress any legitimate purpose which might save a regulatory provision, prospective constitutional difficulties relieve us of that obligation here. Just as courts refrain from construing the language of a statute in a manner which would raise serious constitutional doubts, so should they hesitate before attributing to Congress a legislative purpose which palpably might have the same result.

Second, even were we to impute the purpose of fostering morality to Congress, we would not thereby be able to save the statute *as written*. The Congressional definition of household is overboard with respect to prevailing notions of morality, since it in terms disqualifies all households of unrelated indi-

viduals, without reference to whether a particular group contains both sexes.[13] Were we, in other words, to attempt to justify the statute under a moral purpose, it would be necessary not only to impute to Congress an intent which does not appear in the legislative history, but also to write into the statute a classification (households containing unrelated individuals *of both sexes* as distinct from all other households) which is not presently there.

In such circumstances, courts are not obliged to stretch their imaginations to the farthest limits in order to save a statute.[14] When a court conceives a purpose neither declared in the statute itself nor explicitly identified in the legislative history, and then rewrites the statute so that it is precise with respect to that purpose, it treads perilously close to the congressional domain, since the definition of societal goals, and the choice of the regulatory classifications through which to achieve them, are normally determinations to be made in the first instance by the legislature. The doctrine that courts should endeavor to save the constitutionality of a statute was formulated in deference to the principle of separation of powers. We decline to follow that doctrine past the point at which it threatens to compromise the principle itself.

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[13] One of the groups of plaintiffs, for example, consists, according to undisputed affidavits, of two male roommates who live together in order to share expenses for shelter.

[14] The Court of Appeals for this Circuit has recently stated that "[w]hile courts will sometimes be imaginative in imputing to Congress a purpose which will justify an *explicit* statutory classification, . . . they should be more restrained when inferring the classification itself. . . ." United States v. Hamilton, *supra*, (slip op. at p. 9).

The fact is that we are confronted, as was the Secretary of Agriculture, with hasty, last-minute congressional action—"a child born of the silent union of legislative compromise." *Rosado* v. *Wyman*, 397 U.S. 397, 412 (1970). As an obvious afterthought to its reexamination of the food stamp program through the normal legislative processes, Congress apparently thought it prudent to exclude what it assumed to be an easily identifiable and easily separable group. That group, however, has proven to be not so facilely ascertainable; and the classification has achieved results which were apparently unintended.[18] We think that it is for Congress—and not this court—to address itself more precisely and upon fuller reflection to the true dimensions of the problem, to state its purpose explicitly, and to tailor its language to that purpose with precision. Until such reconsideration has occurred, there is little, if anything, that a court can do to save the classification. For the foregoing reasons, we hold that the 1971 amendment redefining "household" denies plaintiffs equal protection of the laws.

III

There is a final question concerning the nature of the relief to which plaintiffs are entitled. Counsel for defendants in oral argument before us urged the surprising, not to say startling, proposition that, in the event the classification is held to be unconstitutional, this court has no choice but to enjoin the operation of the entire food stamp program. We disagree.

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[18] *See* 117 Cong. Rec. § 6451-52 (daily ed. May 10, 1971).

There is no indication that Congress regarded the relational requirement of its amended definition of "household" as the foundation stone of the entire statutory scheme. To the contrary, it was an afterthought, suggested for the first time in conference committee after both houses had reaffirmed the fundamental outlines of the program. What Congress *did* unmistakably regard as essential was the continuing effectuation of its two major purposes—the alleviation of hunger and the improvement of the health of the agricultural economy. The proper accommodation between the rights of plaintiffs and the purposes of Congress is, therefore, to allow the food stamp program to continue, but to enjoin the enforcement of the amended definition to the extent that it requires eligible households to be comprised solely of "related" individuals.

Such relief will not require the expenditure of public funds to a greater extent than now authorized, but will merely end the unconstitutional discrimination in the use of monies already appropriated which was briefly in effect before judicial intervention was sought. Nor will it do violence to the wording of the statute. Deleting references to the concept of relation from the amended Section 2012(e) renders it essentially identical to the definition of household previously in effect.[16]

By separate order, therefore, we issue a declaratory judgment invalidating 7 U.S.C. § 2012(e), insofar as it operates to deny food stamps to otherwise

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[16] *Compare* (a) 7 U.S.C. § 2012(e) with the relevant words and phrases deleted ["related"; "including legally adopted children and legally assigned foster children, or nonrelated individuals over age 60"] *with* (b) 78 Stat. 703 § 3(c).

eligible households by reason of the fact that they contain one or more unrelated individuals; and we enjoin defendants from denying food stamp eligibility to plaintiffs, and to all other persons otherwise eligible, for that reason.

/s/ Carl McGowan
CARL MCGOWAN
Circuit Judge

/s/ John Lewis Smith, Jr.
JOHN LEWIS SMITH, JR.
District Judge

/s/ Aubrey E. Robinson, Jr.
AUBREY E. ROBINSON, JR.
District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Filed May 26, 1972, James F. Davey, Clerk]

Civil Action No. 615-72

JACINTA MORENO, ET AL., PLAINTIFF

vs.

THE UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL., DEFENDANTS

JUDGMENT

Upon consideration of the respective motions of the plaintiffs and the defendants for summary judgment, the memoranda filed in support of and in opposition to the motions, and the arguments of counsel; and

The pleadings and affidavits on file showing that there is no genuine issue as to any material fact, and that the plaintiffs are entitled to judgment as a matter of law,

It is, this 26th day of May, 1972,

ORDERED that the plaintiffs' motion for summary judgment be and hereby is granted; and it is further

ORDERED that the defendants' motion for summary judgment be and hereby is denied; and it is

ADJUDGED AND DECREED that 7 U.S.C. § 2012(e), insofar as it operates to deny food stamps to persons otherwise eligible by reason of the fact that their households contain one or more unrelated individuals,

violates the Fifth Amendment to the Constitution of the United States; and it is

ORDERED that defendants, their agents, and successors in office, are enjoined from denying, or causing to be denied, food stamp eligibility to plaintiffs, and to all other persons otherwise eligible, by reason of the fact that they live in households which contain one or more unrelated individuals. Defendants shall immediately inform the States that food stamps shall not be denied for such a reason. Pending the issuance by defendants of new regulations which conform to the decision of this court, certification shall be accomplished on the basis provided for by the temporary restraining order of April 6, 1972.

/s/ Carl McGowan
CARL MCGOWAN
Circuit Judge

/s/ John Lewis Smith, Jr.
JOHN LEWIS SMITH, JR.
District Judge

/s/ Aubrey E. Robinson, Jr.
AUBREY E. ROBINSON, JR.
District Judge

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Filed June 23, 1972, James F. Davey, Clerk]

Civil No. 615-72

JACINTA MORENO, ET AL., PLAINTIFF

v.

UNITED STATES DEPARTMENT OF AGRICULTURE; EARL L. BUTZ; EDWARD J. HEKMAN; JAMES KOCHER, DEFENDANTS

NOTICE OF APPEAL

Notice is hereby given this 23rd day of June, 1972, that the defendants hereby appeal to the Supreme Court of the United States from the judgment of this Court entered on the 26th day of May, 1972, in favor of plaintiff against said defendants. This appeal is taken pursuant to 28 U.S.C. §§ 1253 and 2101.

/s/ Harold H. Titus, Jr.
HAROLD H. TITUS, JR.
United States Attorney

/s/ John A. Terry
JOHN A. TERRY
Assistant United States Attorney

/s/ William E. Reukauf
WILLIAM E. REUKAUF
Assistant United States Attorney

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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-534

UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL., APPELLANTS

v.

JACINTA MORENO, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLANTS

OPINION BELOW

The opinion of the three-judge district court (J.S. App. A) is reported at 345 F. Supp. 310.

JURISDICTION

The judgment of the three-judge district court (J.S. App. B) was entered on May 26, 1972. A notice of appeal to this Court (J.S. App. C) was filed on June 23, 1972. On August 16, 1972, Mr. Justice Rehnquist extended the time for docketing the appeal to and including October 3, 1972. The jurisdictional

statement was filed on October 2, 1972, and probable jurisdiction was noted on December 4, 1972. The jurisdiction of this Court rests on 28 U.S.C. 1252 and 1253.

QUESTION PRESENTED

Whether the provision of the Food Stamp Act excluding households of unrelated individuals from eligibility thereunder is constitutional.

STATUTE AND REGULATION INVOLVED

Section 3(e) of the Food Stamp Act of 1964, 7 U.S.C. 2012(e), as amended by Section 2(a) of Pub. L. 91–671, 84 Stat. 2048, provides:

> The term "household" shall mean a group of related individuals (including legally adopted children and legally assigned foster children) or non-related individuals over age 60 who are not residents of an institution or boarding house, but are living as one economic unit sharing common cooking facilities and for whom food is customarily purchased in common. The term "household" shall also mean (1) a single individual living alone who has cooking facilities and who purchases and prepares food for home consumption, or (2) an elderly person who meets the requirements of section 2019(h) of this title.

7 C.F.R. 270.2 provides in pertinent part:

> (b) "Affinity" means the relationship which one spouse because of marriage has to the blood relatives of the other. Such a relationship once existing is not destroyed for program purposes by divorce or death of a spouse. * * *

* * * * *

(jj) "Household" means a group of persons, excluding roomers, boarders, and unrelated live-in attendants necessary for medical, housekeeping, or child care reasons, who are not residents of an institution or boarding house, and who are living as one economic unit sharing common cooking facilities and for whom food is customarily purchased in common: *Provided,* That:

(1) When all persons in the group are under 60 years of age, they are all related to each other; and

(2) When more than one of the persons in the group is under 60 years of age, and one or more other persons in the group is 60 years of age or older, each of the persons under 60 years of age is related to each other or to at least one of the persons who is 60 years of age or older.

It shall also mean (i) a single individual living alone who purchases and prepares food for home consumption, or (ii) an elderly person as defined in this section, and his spouse.

* * * * *

(rr) "Related" means related by blood, affinity, or through a legal relationship sanctioned by State law. Persons shall also be considered related for purposes of the program if they are (1) a man and woman living as man and wife, and accepted as such by the community in which they live, or (2) legally adopted children, legally assigned foster children, or other children under the age of 18, when an adult household member (18 years of age or older) acts in loco parentis to such children.

STATEMENT

Appellees, challenging the constitutionality of the 1971 amendment to Section 3(e) of the Food Stamp Act of 1964, 7 U.S.C. 2012(e), brought this suit for declaratory and injunctive relief in the United States District Court for the District of Columbia.[1] The 1971 amendment, added by Section 2(a) of Pub. L. 91–671, 84 Stat. 2048, restricts eligibility for participation in the food stamp program administered under the Act to households consisting only of "related individuals."[2] Appellees alleged that they satisfied all other eligibility requirements of the Act and that their applications for food stamps were denied solely because their respective households included an individual or individuals to whom they were not related. A three-judge district court was convened pursuant to 28 U.S.C. 2282 and 2284. Upon cross-motions for summary judgment, the court declared Section 3(e), as amended, to be invalid under the Due Process Clause of the Fifth Amendment and enjoined the government from denying food stamp eligibility on the basis of the 1971 amendment.

The food stamp program established by the Act is administered by the Department of Agriculture in cooperation with the states. Eligibility for participation in the program is determined on a household rather

[1] Appellees also contended that the implementing regulation of the Secretary of Agriculture, 7 C.F.R. 270.2(jj), conflicted with the statute as amended. The court below rejected this contention.

[2] Individuals over 60 years of age are exempted from this requirement. See note 3, *infra*.

than individual basis. 7 C.F.R. 271.3(a). An eligible household is issued coupons, or food stamps, in an amount based upon the household's size and composition and designed to cover the cost of providing that household with a nutritionally adequate diet. The household is charged an amount for the food stamps based upon its size and income. The food stamps are used to purchase food at retail stores, and the federal government redeems the food stamps at face value, thereby paying the difference between the actual cost of the food and the amount paid by the household for the stamps. See 7 U.S.C. 2013(a), 2016, and 2025(a).

Section 3(e) of the Act, as amended, defines "household" for eligibility purposes as "a group of related individuals * * * or non-related individuals over age 60 who * * * are living as one economic unit * * * [or] a single individual living alone * * *." Prior to its amendment in 1971, Section 3(e) had included within the definition of eligible "household" a "group of related or non-related individuals * * *." Thus the principal effect of the 1971 amendment was the exclusion of groups of non-related individuals under 60 years of age from eligibility under the Act.[3] Each of the appellees claims to live in a household which is ineligible to

[3] An implementing regulation of the Secretary of Agriculture construes the phrase "group of related individuals" as requiring that all individuals in the group, other than roomers, boarders, and live-in attendants, be "related to each other." 7 C.F.R. 270.2 (jj). The district court viewed this construction as being "well within the bounds of the legislative plan" (J.S. App. A, 7). The regulation further provides that if a household contains more than one person under 60 years of age and at least one person over 60, "each of the persons under 60 years of age [must be] related to each

receive food stamps, solely by virtue of the 1971 amendment, due to the fact that it consists of a group of non-related individuals under 60 years of age.[4]

Upon cross-motions for summary judgment, the district court held that the 1971 amendment to Section 3(e) unreasonably discriminates against persons living in groups containing non-related individuals, in violation of the Due Process Clause of the Fifth Amendment. The court ruled that the challenged classification was not relevant to the Act's stated purposes of improving the agricultural economy and alleviating hunger (see 7 U.S.C. 2011), and it was unable to perceive a reasonable legislative basis for the classification.[5] Its judgment enjoins the government

---

other or to at least one of the persons who is 60 years of age or older." 7 C.F.R. 270.2(jj) (2). Persons are "related" for purposes of the Act if they are "related by blood, affinity [*i.e.*, through one's spouse], or through a legal relationship sanctioned by State law." 7 C.F.R. 270.2(rr) and (b). In addition, persons are related "if they are (1) a man and woman living as man and wife, and accepted as such by the community in which they live, or (2) legally adopted children, legally assigned foster children, or other children under the age of 18, when an adult household member (18 years of age or older) acts in loco parentis to such children." 7 C.F.R. 270.2(rr).

[4] Some of the appellees represent family households which include only one individual not related to the members of the family—in one case a 56-year old diabetic, in another case the 20-year old daughter of a next-door neighbor—for whom the family provides care or support. See J.S. App. A, 13–14, n. 4. However, if such non-related individuals are roomers or boarders, they do not affect the eligibility of their respective households. See note 3, *supra*.

[5] The only possible legislative purpose fully discussed by the court was that of discouraging immorality. The court stated that the 1971 amendment was over-inclusive in terms of that hypothetical purpose and that such a purpose would itself be constitutionally doubtful, citing *Griswold* v. *Connecticut*, 381 U.S. 479, *Stanley* v. *Georgia*, 394 U.S. 557, and *Eisenstadt* v. *Baird*, 405 U.S. 438.

from denying food stamp eligibility to appellees and "all other persons otherwise eligible, by reason of the fact that they live in households which contain one or more unrelated individuals" (J.S. App. B, 25).

SUMMARY OF ARGUMENT

In amending the Food Stamp Act in 1971, Congress excluded households of unrelated persons from eligibility to participate in the food stamp program. This classification of public welfare beneficiaries must be sustained if it has a reasonable basis. *Dandridge* v. *Williams,* 397 U.S. 471. In reviewing the validity of such a classification, a court must explore all possible legislative purposes. Congress had a reasonable basis for the exclusions from the program it adopted in 1971, and those exclusions are constitutional.

Congress could assume that traditional living units—families and persons living alone—contain the largest numbers of individuals with the greatest need for food stamp assistance. Moreover, the exclusion of other households from the program furthered legitimate governmental interests in efficient administration and elimination of abuses. Concern existed over abuses of the program by the voluntary poor and by persons receiving, or in a position to receive, financial assistance from relatives living elsewhere. The potential for such abuse is greater in households of unrelated persons, and the relative fluidity of the living arrangements in such households rendered the detection of abuse, as well as the general administration of the program, more difficult.

In light of these circumstances Congress was entitled to restrict the scope of the food stamp program. The fact that the statutory exclusion might have been more narrowly drawn does not render the classification invalid, for classification need not be made with "mathematical nicety." *Dandridge* v. *Williams, supra,* 397 U.S. at 485.

ARGUMENT

THE PROVISION IN THE FOOD STAMP ACT EXCLUDING HOUSEHOLDS OF UNRELATED INDIVIDUALS FROM ELIGIBILITY THEREUNDER IS CONSTITUTIONAL

A. THIS WELFARE CLASSIFICATION MUST BE UPHELD IF IT HAS A REASONABLE BASIS

As the court below properly noted (J.S. App. A, 17), this case is "appropriate for the application of traditional equal protection analysis." This Court has frequently held that the classification of beneficiaries in a public welfare statute, such as the Food Stamp Act, must be sustained if it has a reasonable basis. *Jefferson* v. *Hackney,* 406 U.S. 535; *Richardson* v. *Belcher,* 404 U.S. 78; *Dandridge* v. *Williams,* 397 U.S. 471. The underlying rationale for "the application of traditional equal protection analysis" to the classifications of beneficiaries in public welfare statutes was explained in *Dandridge* v. *Williams, supra,* 397 U.S. at 487:

> Conflicting claims of morality and intelligence are raised by opponents and proponents of almost every measure * * *. But the intractable economic, social, and even philosophical problems presented by public welfare assistance pro-

> grams are not the business of this Court. The Constitution may impose certain procedural safeguards upon systems of welfare administration * * *. But the Constitution does not empower this Court to second-guess * * * officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients.

Appellees contend (Mot. to Aff. 5–9) that the statutory classification here in question is invalid under the First Amendment without regard to considerations of due process or equal protection. This contention is based on the erroneous assumption that the purpose of the classification is the regulation of morality. See *infra*, pp. 13–18. The impact of the statutory classification on private morality, if any, is purely incidental. Indeed, unmarried couples living together as man and wife may claim food stamps. See 7 C.F.R. 270.2(rr). Thus the statute does not impinge upon the privacy values with which this Court was concerned in *Roe* v. *Wade*, No. 70–18, decided January 22, 1973, *Eisenstadt* v. *Baird*, 405 U.S. 438, and *Griswold* v. *Connecticut*, 381 U.S. 479.

Nor does the statute affect the traditional associational right of organizing for political, social, or economic purposes. Furthermore, the effect of the classification here does not amount to an invasion of whatever right of privacy or association may attend the choice of living arrangements. Cf. *Wyman* v. *James*, 400 U.S. 309, 317–325. Any effect on associational rights is merely incidental to the welfare purpose of the statute. The incidental impact of public welfare

classifications on the general exercise of free choice in living patterns does not raise First Amendment issues as such. See *Dandridge* v. *Williams, supra,* upholding a classification—limiting the total amount a family could receive in welfare payments—indirectly impinging upon the right to have large families. Some discrimination among potential welfare beneficiaries is inevitable in almost any public welfare statute, and the constitutional issue with respect to such discrimination is properly limited to whether it amounts to a denial of due process or of equal protection.

Appellees, relying on *Shapiro* v. *Thompson,* 394 U.S. 618, assert (Mot. To Aff. 16–18) alternatively that because the statutory classification may have some impact upon rights of association and privacy, it therefore may only be justified, on equal protection grounds, by the showing of a compelling state interest. *Shapiro,* however, should not be construed as standing for the bald proposition that any welfare classification having a tangential relationship to the exercise of fundamental rights is subject to strict "compelling state interest" analysis.

In *Shapiro* this Court found that the purpose of the statutory classifications there in question—which denied welfare benefits to otherwise qualified persons who had not resided in the state for a year—was that "of inhibiting migration by needy persons" and held that purpose to be "constitutionally impermissible" (394 U.S. at 629). The right to travel interstate is not only a fundamental personal right; it is a necessary condition for the continued existence of a federal

union. The interest here involved—the right to live with non-relatives—is not of comparable importance. In any event it is not the purpose of the statutory classification here in question directly to inhibit exercise of that right. See *infra*, pp. 13–18.

Many welfare classifications indirectly affect personal rights which could be viewed as fundamental. For example, as indicated above, the classification in *Dandridge* v. *Williams, supra,* could adversely affect the right to have large families, a right which is at least arguably more intimate and fundamental than the general associational interests claimed by appellees. Cf. *Roe* v. *Wade*, No. 70–18, decided January 22, 1973. The broad application of the strict "compelling state interest" test to all statutory classifications which could possibly be construed as touching upon fundamental interests is unwarranted. See *Eisenstadt* v. *Baird*, 405 U.S. 438, 447, invoking the traditional "reasonable basis" test for a statutory distinction between married and unmarried persons.

The primary interest involved in this case is the appellees' interest in receiving food stamps, and although that interest is significant to the appellees, it does not involve a fundamental constitutional right. The proper standard for determining the validity of such a statute is the traditional test of whether the classification of beneficiaries has a reasonable basis. See, *supra*, p. 8.

Under the "reasonable basis" test, a statutory classification " 'will not be set aside if any state of facts reasonably may be conceived to justify it.' " *Dandridge*

v. *Williams, supra,* 397 U.S. at 485. Thus when reviewing equal protection challenges, "courts have attributed to the legislature any reasonably conceivable purpose which would support the constitutionality of the classification." Note, *Developments in the Law—Equal Protection,* 82 Harv. L. Rev. 1065, 1078. See, *e.g., Two Guys from Harrison-Allentown, Inc.* v. *McGinley,* 366 U.S. 582; *McGowan* v. *Maryland,* 366 U.S. 420; *Goesaert* v. *Cleary,* 335 U.S. 464.

Furthermore, "it is, of course, constitutionally irrelevant whether [the] reasoning [sustaining the statute] in fact underlay the legislative decision * * *." *Flemming* v. *Nestor,* 363 U.S. 603, 612. It therefore was the duty of the court below to explore all possible legislative purposes in passing upon the validity of the statute. Its failure to do so was error. "[P]roper judicial restraint and the presumption of constitutionality require that the legislature be given the benefit of any doubt about its purpose." Note, *supra,* 82 Harv. L. Rev. at 1078. Cf. *F. S. Royster Guano Co.* v. *Virginia,* 253 U.S. 412, 420 (dissenting opinion of Mr. Justice Brandeis). Accordingly, this welfare classification must be upheld if it furthers any reasonable purpose which may be attributed to the legislature. And, as we now show, the restriction of food stamps to households containing only related individuals has a reasonable basis and therefore is constitutional.

B. THE EXCLUSION OF HOUSEHOLDS OF UNRELATED INDIVIDUALS FROM ELIGIBILITY UNDER THE ACT HAS A REASONABLE BASIS

The underlying purpose of the food stamp program is that of raising the "levels of nutrition among low-income households." 7 U.S.C. 2011. But in carrying out that purpose Congress is not required to solve all the problems of hunger and malnutrition overnight or to satisfy, simultaneously and identically, the needs of low-income households of every description and composition. As this Court has noted, "[a] legislature may address a problem 'one step at a time,' or even 'select one phase of one field and apply a remedy there, neglecting the others.'" *Jefferson* v. *Hackney*, 406 U.S. 535, 546.

Faced as it is with the familiar and inescapable problem of allocating scarce federal resources, Congress is entitled, at this stage in its experience with the food stamp program, to provide for less than all of those in need. The determination of the scope of a welfare program falls within the discretion of Congress; this Court does not sit "to second-guess * * * officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients." *Dandridge* v. *Williams*, 397 U.S. 471, 487.

In amending the Food Stamp Act in 1971 to limit its coverage, Congress in effect acknowledged that it was unwilling at that time to provide more than a partial solution to the problems of hunger and mal-

nutrition. However, in so defining the current scope of the food stamp program, Congress could reasonably assume that traditional living units—families* and persons living alone—contain the largest numbers of individuals with the greatest need for assistance. In meeting the nutritional needs of most needy persons, Congress was not required to ensure that its program embraced all potential recipients, for as this Court has observed, Congress need not "choose between attacking every aspect of a problem or not attacking the problem at all." *Dandridge* v. *Williams, supra,* 397 U.S. at 487.

Prior to 1971, needy households were eligible for food stamps without regard to whether their members were related to one another. But there is no constitutional significance in the fact that some of the households excluded from eligibility by the 1971 amendment previously had been entitled to food stamps. See *Richardson* v. *Belcher,* 404 U.S. 78, upholding a newly enacted offset against the federal disability benefits paid to persons also receiving state workmen's compensation benefits. The question is whether Congress in 1971, had a reasonable basis for excluding certain households from the program, and in deciding that issue it is irrelevant that Congress previously had included them.

The inclusion of household groups of unrelated persons within the food stamp program posed two interrelated difficulties. First, the program was subject

* Families with unrelated roomers or boarders remain eligible to receive food stamps. See note 3, *supra.* Thus the groups excluded from coverage under the statute are all less traditional, non-family units.

to the abuses by such households discussed below. See, *e.g.*, 116 Cong. Rec. 41998, 42003. Second, the relative instability of such households complicated the task of administration, particularly the detection of abuse. The 1971 amendment was enacted to deal with these problems. The amendment was conceived during the closing days of the Ninety-first Congress (see H. Rep. 71–1793, 91st Cong., 2d Sess., p. 8) and may well have been viewed as a temporary stopgap pending further congressional review of the proper balance to be struck between the recognized needs of the poor and the legitimate governmental interests in efficient administration and elimination of abuses. In any event, the striking of that balance is a matter peculiarly within the competence of the legislative branch.

The food stamp program was subject to abuse in two ways by households of unrelated persons. There was first the problem of those who chose to remain voluntarily poor, adapting their life-style to the availability of food stamps. As Congressman Foley noted, "concern [had been] expressed about utilization of the program by groups of college students enrolled in fraternities or other collections of essentially unrelated individuals who voluntarily chose to cohabit and live off food stamps." 116 Cong. Rec. 42003.

Congressional concern over this kind of program abuse is partially reflected in the requirement that able-bodied persons between the ages of 18 and 65 (with some exceptions) register for and be prepared to accept work as a mandatory precondition to the eligibility of their respective households. 7 U.S.C. 2014 (c). But Congress could further consider that household-groups of unrelated individuals more frequently

contain individuals who abuse the program by remaining voluntarily poor. The legislative history of the 1971 amendment to Section 3(e) reflects that congressional understanding. See H. Rep. No. 91–1793, 91st Cong., 2d Sess., p. 8; 116 Cong. Rec. 44431, 44439.

A second form of abuse was the participation in the food stamp program by persons actually being provided ample financial assistance by relatives who themselves lived elsewhere; such persons would not be voluntarily poor, or even poor at all, but nevertheless might obtain food stamps by not revealing available sources of support.[7] Households consisting of unrelated individuals by definition contain a larger number of persons whose closest relatives live elsewhere; such persons frequently may have available sources of support not reflected in statements of household income. Congress was entitled to restrict the program in order to avoid the possibility of abuse in such households.

Moreover, unlike families and single individuals living alone, households of unrelated persons more typically represent fluid living arrangements having little stability over time. Yet administration of the food stamp program requires certification of household eligibility on a continuing basis with respect to such matters as household size, income, and available

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[7] Congressional concern over the problem of outside support is further reflected in 7 U.S.C. 2014(b), which denies coverage to households containing an adult who is the dependent, for federal income tax purposes, of a person living in another household which is itself ineligible for food stamps. See our jurisdictional statement in *United States Department of Agriculture* v. *Murry*, No. 72–848.

assets, the compliance by its members with the Act's work requirement, and other factors bearing on the household's entitlement to food stamps. See 7 U.S.C. 2014; 7 C.F.R. 271.3 and 271.4. Thus the process of certification and the detection of abuse are more difficult with respect to households of temporary composition. The classification effected by the 1971 amendment serves to facilitate the administration of the program, for the benefitted classes represent relatively more stable living units with respect to which the problems of eligibility surveillance are somewhat alleviated.

Congress could therefore assume that program abuses were both more frequent and more difficult to detect among households of unrelated persons. This is not to say that appellees' households represent instances of abuse of the food stamp program, although they may constitute less stable living arrangements and therefore present greater administrative problems than do traditional household units. But the fact that the specific abuse against which Congress sought to guard in the statute may not exist in this particular case does not justify invalidating the statute. Congress is free "to legislate generally, unlimited by proof of the existence of the evils in each particular situation." *North American Co.* v. *Securities and Exchange Commission,* 327 U.S. 686, 710–711.

Furthermore, the fact that the statutory exclusion might have been more narrowly drawn does not render the classification invalid. "If the classification has some 'reasonable basis,' it does not offend the Con-

stitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' " *Dandridge* v. *Williams, supra,* 397 U.S. at 485. "Requiring compulsively neat logical correlations between classification and objective would ignore legitimate demands for legislative flexibility." Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 Harv. L. Rev. 47–48. The requirements of equal protection do not amount to a "constitutional straitjacket." *Jefferson* v. *Hackney, supra,* 406 U.S. at 546.

In light of these principles, this Court should defer to the congressional judgment that the exclusion of such households at this time from eligibility under the Act is a reasonable and acceptable method of checking and avoiding serious abuses in the food stamp program.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1972

Supreme Court, U. S.
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No. 72-534

UNITED STATES DEPARTMENT OF AGRICULTURE, *et al.*,

Appellants,

v.

JACINTA MORENO, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEES

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BRIEF FOR APPELLEES

QUESTIONS PRESENTED

I. Whether the discriminatory "unrelated household" provision in the Food Stamp Act—which denies health-vital food stamp aid to indigents solely because they reside in their homes with persons unrelated to them—is arbitrary and not rationally related to the purposes of the Food Stamp Act, thereby violating indigent-appellees' rights to equal protection?

II. A. Whether the "unrelated household" provision, which penalizes indigents–by withdrawing their health-vital food stamp aid–solely because they exercised their rights to lawfully and peaceably live in their homes with persons unrelated to them, impinges on appellees' freedom of association and right to privacy as guaranteed by the First, Third, Fourth, Fifth and Ninth Amendments to the United States Constitution?

B. Whether the discriminatory "unrelated household" provision, which impinges upon appellees' fundamental privacy and associational rights, is unreasonably tailored and fails to promote a "compelling governmental interest," thus violating appellees' rights to equal protection?

STATUTE AND REGULATIONS INVOLVED

Section 3(e) of the Food Stamp Act of 1964, 7 U.S.C. §2012(e), as amended in 1971 by Section 2(a) of P.L. 91-671, 84 Stat. 2048, provides:

> The term "household" shall mean a group of related individuals (including legally adopted children and legally assigned foster children) or non-related individuals over age 60 who are not residents of an institution or boarding house, but are living as one economic unit sharing common cooking facilities and for whom food is customarily purchased in common. The term "household" shall also mean (1) a single individual living alone who has cooking facilities and who purchases and prepares food for home consumption; or (2) an elderly person who meets the requirements of section 10(h) of this Act.

7 C.F.R. §270.2(jj) provides:

> "Household" means a group of persons excluding roomers, boarders, and unrelated live-in attendants

necessary for medical, housekeeping or child care reasons, who are not residents of an institution or boarding house, and who are living as one economic unit sharing common cooking facilities and for whom food is customarily purchased in common:

Provided, That:

(1) When all persons in the group are under 60 years of age, they are all related to each other; and

(2) When more than one of the persons in the group is under 60 years of age, and one or more other persons in the group is 60 years of age or older, each of the persons under 60 years of age is related to each other or to at least one of the persons who is 60 years of age or older. It shall also mean (i) a single individual living alone who purchases and prepares food for home consumption, or (ii) an elderly person as defined in this section, and his spouse.

7 C.F.R. §271.3(a) provides:

Eligibility for and participation in the program shall be on a household basis. All persons, excluding roomers, boarders, and unrelated live-in attendants necessary for medical, housekeeping or child care reasons, residing in common living quarters shall be consolidated into a group prior to determining if such a group is a household as determined in §270.2(jj) of this subchapter.

STATEMENT OF THE CASE

The Food Stamp Act [7 U.S.C. §§2011 *et seq.*] was passed by Congress in 1964, and amended in 1971 [P.L. 91-671 (Jan. 11, 1971), 84 Stat. 2048] as the Federal Government's major step toward remedying the wide-

spread conditions of undernutrition and hunger existing throughout the country. As reflected in the Act's Declaration of Policy [7 U.S.C. §2011], Congress sought to raise the levels of nutrition among all low-income households, and thereby alleviate hunger and malnutrition, by allowing needy households to purchase a nutritionally adequate diet through the use of food stamps.

The operation of the Food Stamp Program is fairly simple: a poverty-stricken household is charged a certain amount of money and in exchange receives food stamps of greater value. The difference between the value of the stamps received—the "coupon allotment"—and the cost of the stamps, is a bonus which provides recipients with a direct increase in food purchasing power. The stamps may be used to purchase domestic food, other than liquor and tobacco, at grocery stores certified by the Agriculture Department to sell food for stamps.

Participation in the Food Stamp Program is limited to impoverished households [7 U.S.C. §2014(a)]. These households are entitled to sufficient stamps so that they can obtain a "nutritionally adequate diet" [7 U.S.C. §§2011, 2013(a) and 2016(a)]. The program is open to both public assistance households and needy non-public assistance households, with the latter group comprising a substantial portion of the total number of food stamp recipients.[1] The Food Stamp Program, therefore, is not an extension of the various welfare programs, but rather,

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[1]According to U.S.D.A. statistics, 38% of the food stamp participants in June 1972 (last month of the fiscal year), were persons who were not receiving public assistance. [Statistical Summary of Operations, Monthly Report for June, 1972, Program Reporting Staff, Food and Nutrition Service, U.S.D.A (Aug. 7, 1972).]

is designed to alleviate the threat of malnutrition among all needy households.

While eligibility in the Food Stamp Program has always been, and currently is, on a household basis, the statutory definition of the word "household" has changed. In 1964, Congress defined household in Section 3(e) of the Food Stamp Act as follows:

> The term "household" shall mean a group of *related or non-related* individuals, who are not residents of an institution or a boarding house, but are living as one economic unit sharing common cooking facilities and for whom food is customarily purchased in common. The term "household" shall also mean a single individual living alone who has cooking facilities and who purchases and prepares food for home consumption. [7 U.S.C. §2012(e) prior to P.L. 91-671] (emphasis added)

In the amended Food Stamp Act, however, the definition of "household" now states:

> The term "household" shall mean a group of *related individuals* (including legally adopted children and legally assigned foster children) or non-related individuals over age 60 who are not residents of an institution or boarding house, but are living as one economic unit sharing common cooking facilities and for whom food is customarily purchased in common. The term "household" shall also mean (1) a single individual living alone who has cooking facilities and who purchases and prepares food for home consumption; or (2) an elderly person who meets the requirements of section 10(h) of this Act. [7 U.S.C. §2012(e)] (emphasis added)

By changing the definition of "household" in the Food Stamp Act from "a group of related or nonrelated

individuals" to "a group of related individuals,[2] Congress sought to eliminate politically unpopular "hippies" from food stamp eligibility. In effect, however, the "unrelated household" provision in the Act, and the food stamp regulations promulgated pursuant thereto [7 C.F.R. §§270.2(jj) and 271.3(a)], have resulted in the denial of food stamps to thousands upon thousands of needy persons whose households do not even remotely resemble "hippy communes" and to whom food stamps are the only means through which they can avoid hunger and malnutrition. Indeed, the undisputed evidence in this case indicates that the provision has hardly effected so-called "hippies" at all, but has eliminated the poorest of the poor from health-vital food stamp aid—the unemployed, A.F.D.C. families and migrant laborers [see Appendix, at 43], those persons who are most in need of living with unrelated persons or families in order to conserve meager resources—thereby substantially frustrating the clear purposes of the Food Stamp Program. [7 U.S.C. §2011]

Plaintiff-appellees are all members of needy households financially eligible for food stamp relief. They comprise both public assistance and non-public assistance households that would be able to participate in the Food Stamp Program but for the fact that their households contain one or more unrelated members. They have, therefore, been denied food stamps despite their desperate inability to purchase a "nutritionally adequate diet" [7 U.S.C. §§2011, 2013(a), and 2016(a)] with their present income, and despite the fact that many of them are living with unrelated persons because of the economic

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[2] Unrelated persons over 60 years of age do not disqualify needy persons, living together, from eligibility in the Food Stamp Program.

benefits of combining their meager resources, or for health purposes.

Appellee Jacinta Moreno, of Homestead, Florida, for example, is a 56 year old diabetic in extremely poor health who decided, for health and economic reasons, to live with Ermina Sanchez and the latter's three children. Mrs. Sanchez helps care for appellee Moreno, and, in turn, the two of them share common living expenses. Appellee's monthly income is $75, derived from public assistance. Mrs. Sanchez receives a total monthly income of $133, also derived from public assistance (A.F.D.C.). Out of this income, the household pays: $95 per month for rent, of which appellee pays $40, and $40 a month for gas and electricity, of which $10 is paid by appellee.

In addition to these household expenses, appellee Moreno must spend $10 a month for transportation for her two monthly visits to the hospital, and $5 each month for laundry expenses. Consequently, appellee has only $10 remaining each month with which to purchase food and other necessities. This amount is particularly inadequate for her because of the special foods her poor health demands. Her need for food stamp aid, therefore, is most desperate. Yet, on February 1, 1972, appellee Moreno was denied food stamps solely because she is unrelated to all other members of her household.

Mrs. Moreno has been both wise and fortunate in her association with the Sanchez family. She has been able to create a household in which she can receive care and can pool her meager resources. Within the privacy of her newly-found home, she can best hope to survive these conditions of poor health and low funds. However, as a result of the unrelated household provision in the Food Stamp Act [7 U.S.C. §2012(e)], appellee Moreno is left with this Hobson's choice: she can leave her home and

receive vital Federal food relief, or she can remain with the Sanchez family and attempt to meet her special nutrition and other needs on a maximum of $10 a month.[3] [Appendix, at 23-25]

For plaintiff-appellee Sheilah Ann Hejny of Kernersville, North Carolina, the situation is similarly desperate. Although she, her husband and their three children—ages 5, 3 and 2—comprise an indigent household, the Hejnys took in a twenty year old girl, Sharon Sharp, who is unrelated to them but who had lived next door until she was forced by her mother to leave her home. Sharon has lived with the Hejnys ever since and has become an integral member of the household. She shares in the housekeeping responsibilities of her adopted home and, in turn, receives the love, care and support of the Hejny family.

The stability of this household association has been threatened by the unrelated household provision. Because of their impoverished circumstances, the Hejnys are in great need of food assistance. They have been receiving $144 worth of food stamps monthly at a cost of $14, providing them with $130 in vitally-needed food relief. Soon after Sharon entered their home, however, the Hejnys were denied this vital assistance because their household contained an unrelated member. They have

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[3]Mrs. Sanchez and her three children have been left in a similar predicament. If they continue to reside with appellee Moreno, they too will be cut off much-needed Federal food aid since the Food Stamp Act, and regulations promulgated pursuant thereto, deny relief to persons residing with the "unrelated" person. [7 U.S.C. §2012(e); 7 C.F.R. §§270.2(jj) and 271.3(a)] Prior to the implementation of the unrelated household provision, Mrs. Sanchez and her three children received $108 worth of food stamp coupons per month at a cost of $18—thereby providing them with a crucial $90 in food relief. [Appendix, at 24]

been left with the following dilemma, therefore: either order Sharon out of their home, leaving her homeless, thereby enabling the Hejnys to receive food stamps, or continue their present association with Sharon, but receive no food assistance. The former choice is particularly abhorrent to the Hejnys because of the emotional, physical and psychological improvements they have observed in Sharon since they have taken her in. Yet, the Hejnys must consider the disastrous effects on the health and well-being of their youngsters if they were to go without Federal food assistance. [Appendix, at 28-31]

Plaintiff-appellee Victoria Keppler, who resides in Oakland, California, also feels the brunt of the wide-sweeping unrelated household provision. Her daughter suffers from an acute hearing deficiency and requires educational instruction in a school for the deaf. The only schooling available to her, however, is located in an area where rent costs are high. Since she is dependent on public assistance, appellee Keppler cannot afford the rents in that area. Consequently, she and her two minor children moved into an apartment, not far from the school, with a woman, also on public assistance, to whom appellee is not related. By combining their resources, appellee and her friend are able to afford their rent, and appellee's daughter can attend the nearby school.

Appellee Keppler's fortunate household association, however, has resulted in a major crisis with regard to her ability to feed herself and her children. Prior to living with, and sharing rent costs with her friend, appellee was able to receive food stamps with which she could, albeit barely, purchase a fairly decent diet for her family. Now her family has been denied food stamps aid because of the unrelated household provision. Food stamps are essential to the Kepplers, but their present household

composition is also essential if appellee's daughter is to receive proper educational instruction. Mrs. Keppler must choose between keeping her present household arrangement, that permits her daughter to receive educational instructions, thereby denying her children a nutritionally adequate diet, or change those household arrangements in order to get food relief, thereby depriving her daughter of her educational opportunities.

Appellees instituted a class action in the United States District Court for the District of Columbia to enjoin the enforcement of the unrelated household provisions of the Food Stamp Act and regulations that so drastically threatened the well-being of their households. They argued that these discriminatory provisions impinged upon their association and privacy rights, within the confines of their homes, without promoting a compelling governmental interest and without being rationally related to the purposes of the Food Stamp Program, thereby denying them equal protection of the law. On April 16, 1972, District Judge Smith temporarily enjoined appellants from denying food stamp eligibility to appellees, and other persons similarly situated, on the basis of the challenged provisions. A three-judge District Court convened to hear this case pursuant to 28 U.S.C. §§2282 and 2284. After hearing oral arguments, and upon cross-motions for summary judgment, the District Court ruled that the provisions were invalid under the Due Process Clause of the Fifth Amendment and enjoined the Government from denying food stamp eligibility on the basis of these provisions. Appellants appealed this decision.

SUMMARY OF ARGUMENT

The unrelated household provision in the Food Stamp Act denies food stamp eligibility to households containing persons who are not related to all other members in the household. In doing so, the provision denies vital food relief to the poorest of the poor—those persons living with unrelated persons in order to pay for essential living costs, such as food and shelter. The provision, therefore, discriminates against certain needy households in a manner that is arbitrary and capricious and totally unrelated to the purposes of the Food Stamp Act or any other legitimate governmental purpose.

In addition, the unrelated household provision impinges on poor peoples' freedom of association and right to privacy—in that it penalizes them for exercising their fundamental right to live peaceably and lawfully with whomever they want, in the confines of their homes—but does not actually or reasonably promote a "compelling governmental interest." Consequently, the provision violates appellees' rights to equal protection as guaranteed by the Fifth Amendment to the United States Constitution.

ARGUMENT

I.

THE DISCRIMINATORY DENIAL OF AID TO NEEDY UNRELATED HOUSEHOLDS IS ARBITRARY AND CAPRICIOUS AND NOT REASONABLY RELATED TO ANY PURPOSE OF THE FOOD STAMP ACT.

The unrelated household provision in the Food Stamp Act creates two classes of persons for purposes of food stamp eligibility: *one class* composed of persons financially in need of food stamp relief who reside in households in which all members are related to one another; and *another class* composed of persons similarly in need of food stamp relief, but who live in households that include one or more persons who are unrelated to everyone else in the household. Except for this one difference, members of the latter class are indistinguishable from those in the former class. Solely as a result of this singular distinction, impoverished members in the latter class are denied health-vital food stamp relief while the members in the former class are entitled to such assistance. Such a discriminatory denial of aid is arbitrary and capricious and not reasonalby related to any purpose of the Food Stamp Act and thereby violative of equal protection.

It is well-settled that the Constitutional dictates of equal protection are applicable to the Federal defendant-appellants herein through the Due Process Clause of the Fifth Amendment. [*Bolling v. Sharpe*, 347 U.S. 497, 499 (1954); *Schneider v. Rusk*, 377 U.S. 163, 168 (1964); *Davis v. Richardson*, 342 F. Supp. 588, 591 (D. Conn. 1972), *aff'd*, 41 U.S.L.W. 3345 (U.S., Dec. 18, 1972); *Griffin v. Richardson*, 346 F. Supp. 1226, 1232 (D. Md.

1972), *aff'd*, 41 U.S.L.W. 3345 (U.S., Dec. 18, 1972); *United States v. Jones*, 384 F.2d 781, 782 (7th Cir. 1967).] Federal officials are not permitted to arbitrarily discriminate against persons in the administration of government benefit programs. [*Shapiro v. Thompson*, 394 U.S. 618, 641-642 (1969); *Davis v. Richardson, supra; Griffin v. Richardson, supra.*]

In the *Davis* decision that was recently affirmed by this Court, the three-judge District Court struck down a provision of the Social Security Act [42 U.S.C. §403(a)(3)] as being violative of the Fifth Amendment's equal protection guarantee. In so doing, the Court set forth the applicability of equal protection to the Fifth Amendment:

> The due process clause of the fifth amendment prohibits, as to the *federal government*, statutes creating arbitrary discriminations which have no rational basis in legitimate governmental purposes. Although there is no specific equal protection guarantee applicable to the federal government, *equal protection standards have been imported into the due process clause of the fifth amendment. Bolling v. Sharpe*, 347 U.S. 497, 74 S. Ct. 693, 98 L.Ed. 884 (1954); *Richardson v. Belcher*, 404 U.S. 78, 81, 92 S.Ct. 254, 30 L.Ed.2d 231 (1971); *Flemming v. Nestor*, 363 U.S. 603, 611, 80 S.Ct. 1367, 4 L.Ed.2d 1435 (1960); *Bolton v. Harris*, 130 U.S. App. D.C. 1, 395 F.2d 642 (1968). Although Congress has great latitude to make classifications in the area of economic and welfare legislation, *a provision must have some rational basis or be pertinent to some proper objective of the Congress in order to withstand challenge.* [*Davis v. Richardson, supra*, 342 F. Supp., at 591] (emphasis added)

Because the unrelated household provision does not have a rational basis pertinent to the objectives of Congress in passing the Food Stamp Act, it fails to meet the equal protection standards found within the due process clause of the Fifth Amendment and thereby violates that Constitutional guarantee.

A. The Unrelated Household Provision Fails To Promote Any Purpose That Is Reasonably Related to the Purposes of the Food Stamp Act or That Is Constitutionally Permissible.

In a case recently decided by this Court, Chief Justice Burger explained the basic principles governing the application of the Equal Protection Clause. The Chief Justice, in *Reed v. Reed*, 404 U.S. 71, 75-76 (1971), stated:

> In applying that clause, this Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. *Barbier v. Connolly*, 113 U.S. 27 (1885); *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61 (1911); *Railway Express Agency v. New York*, 336 U.S. 106 (1949); *McDonald v. Board of Election Commissioners*, 394 U.S. 802 (1969). The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

Even more recently, Justice Powell, in delivering the opinion of the Court in *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972), stated:

> The tests to determine the validity of state statutes under the Equal Protection Clause have been variously expressed, *but this Court requires, at a minimum, that a statutory classification bear some rational relationship to a legitimate state purpose.* [406 U.S., at 172] (emphasis added)

See, also, *Gulf, Colorado and Sante Fe R. Co. v. Ellis*, 165 U.S. 150, 155 (1897); *Morey v. Doud*, 354 U.S. 457, 465 (1957); *Carrington v. Rash*, 380 U.S. 89, 92-93 (1965); *Rinaldi v. Yeager*, 384 U.S. 305, 308-309 (1966); *Smith v. King*, 277 F. Supp. 31, 38 (M.D. Ala. 1967), *aff'd on other grounds*, 392 U.S. 309 (1968); *James v. Strange*, 407 U.S. 128, 140-141 (1972).

The purposes of the Food Stamp Act, to which the unrelated household provision must be reasonably related if it is to meet the minimal Constitutional requirements, are carefully delineated in the Act's Declaration of Policy. This Declaration states:

> It is hereby declared to be the policy of Congress, in order *to promote the general welfare*, that the Nation's abundance of food should be utilized cooperatively by the States, the Federal Government, local governmental units, and other agencies *to safeguard the health and well-being of the Nation's population and raise levels of nutrition among low-income households.* The Congress hereby finds that the limited food purchasing power of low-income households contributes to hunger and malnutrition among members of such households. The Congress further finds that increased utilization of food in establishing and maintaining adequate national levels of nutrition *will promote the distri-*

bution in a beneficial manner of our agricultural abundances and will strengthen our agricultural economy, as well as result in more orderly marketing and distribution of food. *To alleviate such hunger and malnutrition,* a food stamp program is herein authorized which will permit low-income households to purchase a nutritionally adequate diet through normal channels of trade.[4] [7 U.S.C. §2011] (emphasis added)

It is obvious that the unrelated household provision is not reasonably related, and, in fact, is repugnant, to the afore-quoted purposes of the Food Stamp Act. The exclusion of impoverished and hungry persons from food stamp relief–solely because they reside in households where one or more persons are unrelated to everyone else–cannot in any way: "promote the general welfare"; "safeguard the health and well-being of the Nation's population"; "raise levels of nutrition among low-income households"; "promote the distribution in a beneficial manner of our agricultural abundances"; "strenghthen our agricultural economy"; or "alleviate . . . hunger and malnutrition." Indeed, the only relationship that the unrelated household provision has to the purposes of the Food Stamp Act is that it wholly frustrates those purposes.

It is certainly incontrovertable that the lofty and commercial goals articulated in the Act's Declaration of Policy are not advanced by: denying much-needed food stamps to appellee Moreno, a 56 year old diabetic with $75 monthly income, simply because she resides with a family that provides her with health and economic care; withdrawing food stamp aid from appellee Hejny's family

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[4]See also the District Court Opinion at J.S., App. A, at 15, 17, for a concise description of the purposes of the Food Stamp Act.

because it provided a home, with love and care, for previously unwanted Sharon Sharp; or denying health-vital relief to appellee Keppler because she found housing arrangements that enable her to send her child to a school for the deaf. The appellees and their class, the poorest of the poor—those persons who are unable to pay for housing and other necessities due to severe economic hardship—are precisely the persons sought to be aided by the Food Stamp Program, and yet they are arbitrarily excluded from food relief because, out of brutal necessity, they reside with persons unrelated to them. Clearly the unrelated household provision of the Act is totally unrelated to the accomplishment of any of the Food Stamp Program's purposes.

B. The True Purpose of the Unrelated Household Provision—The Elimination of So-Called "Hippies" From Food Stamp Program Participation—Is a Constitutionally Impermissible Purpose and Is Not Suitably Furthered.

The sole Congressional purpose in enacting the unrelated household amendment in 1971 was to prevent politically-unpopular, so-called "hippies" and "hippy communes" from participating in the Food Stamp Program. Although there is only sparse legislative history on the provision—since it was not contained in either the Senate bill [S. 2547][5] or the House bill [H.R. 18582][6] but was first added in the Conference Committee and hurriedly considered just before the New Year's adjourn-

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[5]See 115 Cong. Rec. 26732-26743, 26845-26888 (1969).

[6]See Cong. Rec., 91st Cong., 2d Sess. (Daily Edition, Dec. 16, 1970), at H11818-H11873.

ment[7] –all of the statements about the provision bear out this Congressional intent.[8] For example, in explaining the Conference Committee's amendment to section 3(e) of the Act [7 U.S.C. §2012(e)], the House conferees stated:

> The House bill did not alter the definition of "household" under section 3(e) of the Act. *The conference substitute includes language which is designed to prohibit food stamp assistance to communal "families" of unrelated individuals.*
>
> The substitute, of course, contemplates that the term "related" shall apply to the relationship between married spouses and to such degree of blood relation and other legal relation (such as adoption and foster children) that the Secretary by regulation may prescribe. The requirement for household members to be related does not apply to persons over 60 years of age. [Conf. Rep. No. 91-1793, as contained in Cong. Rec., 91st Cong., 2d Sess. (Daily Edition, Dec. 22, 1970), at H12267] (emphasis added)

The Senate conferees also made it clear that the provision was designed to exclude "hippy communes" from Program participation. After indicating that "[h]ouseholds consisting of unrelated individuals under age 60 . . . would be excluded" from the Program [Cong. Rec., 91st Cong., 2d Sess. (Daily edition, Dec. 31, 1970), at S21682], Agriculture Committee Chairman Ellender,

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[7]See Cong. Rec., 91st Cong., 2d Sess. (Daily Edition, Dec. 30, 1970), at H12541-H12548; Cong. Rec., 91st Cong., 2d Sess. (Daily Edition, Dec. 31, 1970), at S21681-S21694.

[8]Indeed, the appellants admitted that the only Congressional purpose in enacting the unrelated household provision was to exclude "hippy communes" from food stamp relief. [Appendix to Brief, at 20a.]

on behalf of the Senate conferees, compared the provisions in the Senate, House and Conference versions of the bill:

> *Senate* [section 1(3)] redefines "household" to include an elderly person eligible for the "meals on wheels" program.
>
> *House* does not do this (creating a question as to how elderly persons who do not have cooking facilities can obtain the coupons to be used by them to participate in the "meals on wheels" program).
>
> *Conference Substitute* adopts Senate provision, plus a provision designed to exclude households consisting of unrelated individuals under the age of 60 (*such as hippy communes*). [*Id.*] (emphasis added)

Senator Holland, one of the Senate conferees, also indicated the purpose of the amendment to section 3(e) of the Act [7 U.S.C. §2012(e)]:

> The next change was that the term "household" was further defined so as to exclude households consisting of unrelated individuals under the age of 60, *such as "hippy communes"* which I think is a good provision in this bill. [Cong. Rec., 91st Cong., 2d Sess. (Daily edition, Dec. 31, 1970), at S21690] (emphasis added)

This brief legislative history of the provision—which, according to the research of appellees' counsel, is the only relevant legislative history on the amendment to section 3(e)—clearly verifies that the provision was designed to exclude so-called "hippies" and "hippy communes" from Food Stamp Program participation.[9]

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[9] In a postscript to this legislative history, six Republican members of the Senate Select Committee on Nutrition and Human Needs—Senators Henry Bellmon, Marlow W. Cook, Robert J. Dole, Charles H. Percy, Richard S. Schweiker and Robert Taft, Jr.—spoke

The purpose of the provision was to single out certain persons whose life-styles were offensive to Congress and to deny that group Federal food relief. But, as this Court recently stated in *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95 (1972), in all equal protection cases "the crucial question is whether there is *an appropriate governmental interest* suitably furthered by differential treatment. See *Reed v. Reed*, 404 U.S. 71, 75-77 (1971); *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972); *Dunn v. Blumstein*, 405 U.S. 330, 335 (1972)." (emphasis added) It seems peradventure clear that the denial of food aid to "hippies" does not comprise such an "appropriate governmental interest," but rather reflects a Constitutionally impermissible purpose.

The California Supreme Court, in *Parr v. Municipal Court*, 3 Cal. 3d 861, 92 Cal. Rptr. 153, 479 P.2d 253 (1971), dealt specifically with an issue that was very much on point. In striking down a city ordinance directed against "hippies," the Court stated that "[l]aws are invalidated by the Court as discriminatory because they are expressions of hostility or antagonism to certain groups of individuals." [3 Cal. 3d, at 863] The Court concluded:

> This Court has been consistently vigilant to protect racial groups from the effects of official prejudice, and we can be no less concerned because the human beings currently in disfavor are identifiable by dress and attitudes rather than by color. [3 Cal. 3d, at 870]

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about the implementation of "the so-called 'anti-hippie commune' provision" and denounced the fact that it was being used to cut off families "who might happen to have 'taken in' a friend out of kindness." [Cong. Rec., 92d Cong., 1st Sess. (Daily edition, May 10, 1971), at S6451-S6452]

This Court has consistently invalidated governmental action that was intended to discriminate against groups of persons because of their politically unpopular status. [See, e.g., *Levy v. Louisiana*, 391 U.S. 68 (1968), and *Weber v. Aetna Casualty & Surety Co., supra*–discrimination against illegitimate children; *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) and *Graham v. Richardson*, 403 U.S. 365 (1971)–discrimination on the basis of race and national origin; *Reed v. Reed, supra*–discrimination on the basis of sex; *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966)–discrimination on the basis of wealth; *Schneider v. Rusk*, 377 U.S. 163 (1964)–discrimination on the basis of alienage.] The unrelated household provision–by singling out a politically unpopular group, albeit a group that escapes precise definition–is yet another example of governmental action that seeks to further an impermissible objective. The discriminatory deprivation of health-vital food assistance that results from this provision, therefore, is unconstitutional.

Similarly important, however, is the fact that the unrelated household provision does not even suitably further the provision's impermissible objective. [See *Weber v. Aetna Casualty & Surety Co., supra*, 406 U.S., at 173; *Eisenstadt v. Baird*, 405 U.S. 438, 452-455 (1972)] Although the provision was directed against "hippy communes," its effect is to harm the poorest of the poor–unemployed people, A.F.D.C. recipients and migrant laborers, those persons who are so poor that they must share living expenses with non-family members–not "hippies." As the California Director of Social Welfare indicated:

> The "related household" limitations will eliminate many households from eligibility in the Food Stamp Program. It is my understanding that the Congressional intent of the new regulations are specifically

aimed at the "hippies" and "hippie communes". Most people in this category can and will alter their living arrangements in order to remain eligible for food stamps. However, *the AFDC mothers who try to raise their standard of living by sharing housing will be affected.* They will not be able to utilize the altered living patterns in order to continue to be eligible without giving up their advantage of shared housing costs.

In California it is a common practice for the very poor to "move in" with friends during unemployment, or any type of crisis. Many of the migrant labor camps are so constructed that the people living there cannot be eligible on the basis of "related household". This section will eliminate a segment of the migrant workers who by definition are to be eligible for food stamps. We have found no way to "interpret" so these migrants in this type of camp can be eligible. [App., at 43] (emphasis added)

Thus, Congress has failed to achieve the impermissible purpose of eliminating "hippies" from Food Stamp Program participation, but has tragically and substantially harmed the very persons it set out to assist. The unrelated household provision, therefore, undermines Congressional Food Stamp Program purposes seeking "[t]o alleviate . . . hunger and malnutrition" and frustrates the efforts that "will permit low-income households to purchase a nutritionally adequate diet through normal channels of trade." [7 U.S.C. §2011] Such a result, however, was not wholly unpredictable insofar as Congress gave scant thought to the provision. As the District Court most aptly phrased it:

The fact is that we are confronted, as was the Secretary of Agriculture, with hasty, last-minute

> Congressional action—"a child born of the silent union of legislative compromise." *Rosado v. Wyman*, 397 U.S. 397, 412, 90 S.Ct. 1207, 1218, 25 L.Ed. 2d 442 (1970). As an obvious afterthought to its reexamination of the food stamp program through the normal legislative process, Congress apparently thought it prudent to exclude what it assumed to be an easily identifiable and easily separable group. That group, however, has proven to be not so facilely ascertainable; and the classification has achieved results which were apparently unintended.[10] [345 F. Supp., at 315]

In sum, this statutory provision was not considered by Congress with any degree of precision; it sought to implement a Constitutionally impermissible objective; it failed to reasonably further that objective; and, instead, denied health-vital Federal food relief to the persons most in need of it, completely contrary to the Food Stamp Act's purposes. [7 U.S.C. §2011] As a result, the provision's discriminatory denial of essential food stamp

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[10] After the Senate-House Conference, a statement by Congressman Poage—Chairman of the House Agriculture Committee and the leader of the House Conference delegation—reflected the hurried atmosphere with which Congressmen and Senators were first exposed to the unrelated household provision just before the New Year's adjournment:

> In view of the lateness in this session, it seems desirable to us that we accept this conference report if we are going to have assurance of a continuation of assistance to millions of deserving people. It should be perfectly clear, as I see it, that there is no chance whatever to extend the present law for 6 months, for 6 weeks, or for 6 days. I, therefore, would urge my colleagues to vote for the adoption of the conference report lest the food stamp program be allowed to expire. [Cong. Rec., 91st Cong., 2d Sess. (Daily edition, Dec. 30, 1970), at H12543]

aid to the appellees is violative of their rights to equal protection.

C. Appellants Have Failed To Produce a Legitimate Purpose That Is Suitably Furthered by the Unrelated Household Provision.

Appellants have based much of their defense on the proposition that this Court must uphold the unrelated household provision if any reasonable basis for the provision can be found, i.e., if any reasonable purpose for the provision could be attributed to Congress. Indeed, they have searched in vain for such a basis ever since this action was brought and have asked the Judiciary to actively join in this search. Their initial foray, during the oral argument on the motion for a temporary restraining order, failed to turn up any reasonable basis. The transcript of the oral argument provides the following exchange on this issue:

> THE COURT: How is the regulation rationally related to the Act?
>
> MR. BRICKFIELD: Your Honor–
>
> THE COURT: The purposes of the Act?
>
> MR. BRICKFIELD: It is rational to the extent that the Act goes so far and no farther. It is a question of Congress stopping after giving so many people so much benefit and what we feel plaintiffs are complaining of here, they did not get in and they are not included and admittedly, some Plaintiffs were included previously, but Congress just has not gone quite that far, and I think Congress can choose how far to go and how far not to go in granting benefits of this nature.
>
> Until recently, Puerto Rico did not receive equal– did not receive social security benefits. There are

certain social security benefits that the citizens of Puerto Rico do not receive and this was challenged quite recently and it is on appeal before the First Circuit, the question of whether this was a denial of equal protection to the residents of Puerto Rico to deny them social security benefits.

The District Court answered in the affirmative and said it was not a denial of equal protection.

I don't think Congress has to give food stamps to everyone. I think they can be allowed to give them to whom they want.

THE COURT: On some rational basis?

MR. BRICKFIELD: Yes.

[Appendix to this Brief, at 4a-5a]

Between the argument on the temporary restraining order motion and the argument before the three-judge District Court, appellants had ample opportunity to discover a rational basis for the unrelated household provision. Yet, although they knew that such a search would be crucial for their case, and although they had filed a motion for a summary judgment, the appellants began their presentation by stating that *if the Court could not find a rational basis* for the unrelated household provision, then an evidentiary hearing should be provided "to determine if in fact there is a rational basis." [Appendix to Brief at 10a-11a]

In order to search for a Congressional purpose, Circuit Judge McGowan sought to find out whether the provision was intended to promote morality. [See Appendix to Brief, at 20a] In response, Justice Department attorney Brickfield indicated that "the only congressional contention [sic] that we see is the congressional intention that the hippy communes would not be included. What

morality we can read into that, I am not sure."[11] [Appendix to Brief, at 20a] In essence, the appellants' position was that the Court should somehow, somewhere find a rational basis for the unrelated household provision:

> We want you to find that there was some rational basis, rational set of facts somewhere that Congress could have passed this Act on, and if you can find that, then this statute must be upheld. That is what we contend Flemming versus Nestor is. [Appendix to Brief, at 22a]

Although, throughout the District Court proceedings, the appellants never specified any purpose to which the unrelated household provision was rationally related, the appellants inferred that numerous Federal undertakings–such as taxation and the public welfare programs–seem to seek the maintenance of family ties. [Appendix to Brief, at 21a and 23a; see also, *id.*, at 18a] While the appellants never alleged that this purpose should be imputed to the unrelated household provision, the three-judge District Court probed the appellants on that subject. In responding to the Court's question thereon, the appellants conceded that an individual living alone is not disqualified by the unrelated household provision from the receipt of food stamp assistance; to the contrary, individuals who live alone–regardless whether they have abandoned their spouses, children and/or other relatives–are entitled to food stamp aid if they are poor.

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[11] In their Brief to this Court, appellants have indicated that the District Court proceeded "on the erroneous assumption that the purpose of the classification is the regulation of morality." [Appellants' Brief, at 9] Clearly, therefore, the promotion of morality was not a purpose of Congress and is not relevant to the present proceeding.

[*Id.*, at 19a; 7 U.S.C. §2012(e); 7 C.F.R. §§270.2(jj) and 271.3(a)]

That the unrelated household provision was not intended to, and does not, promote the maintenance of family ties, is manifestly clear. Persons are not penalized for breaking up their families, obtaining divorces, abandoning their children, or the like, by the unrelated household provision. Indigents–like appellee Hejny's family, appellee Keppler's family, and the Sanchez family (who reside with appellee Moreno)–are denied food stamps only if an unrelated person moves into their household. Even though their families have remained intact and live together in general harmony they are nevertheless denied health-vital food stamp relief. The provision, therefore, does not seek to maintain the family relationship, nor does it penalize persons for dissolving or attenuating that relationship; it merely penalizes those families that have aided a friend, or other family, in need of assistance. Indeed, aside from ousting the non-related person from the household, the only way indigent members of appellees' families can obtain food stamp relief is if they leave their homes and set up another household, and apply for food stamps, apart from their families. Appellants, therefore, appropriately failed to ascribe–in their Brief to this Court–the maintenance of the family relationship as a basis for upholding the Constitutionality of the unrelated household provision. [See, also, *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); *Mindel v. United States Civil Service Commission*, 312 F. Supp. 485 (N.D. Calif. 1970).]

In their Brief to this Court, appellants–for the first time–have imaginatively ascribed an alleged purpose for the provision here at issue: the prevention of Program

abuses, particularly the perpetration of fraud.[12] [Appellants' Brief, at 14-15] Insofar as the prevention of fraud is a legitimate and vital concern for the Congress—as indeed it is for the appellees who, inevitably, must suffer due to wrongful deeds of less needy, sometimes affluent, persons—appellees "do not question the importance of that interest; what we do question is how the challenged statute will promote it." [*Weber v. Aetna Casualty & Surety Co., supra*, 406 U.S., at 164] The denial of aid to unrelated households clearly has no "fair and substantial relation to the [alleged] object of the legislation." [*Reed v. Reed, supra*, 404 U.S., at 76; *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920); see, also, Gunther, "The Supreme Court 1971 Term Foreword: In Search of Evolving Doctrine on a Changing Court: A Model For A Newer Equal Protection," 86 Harv. L. Rev. 1, 20-40 (1972).]

Contrary to appellants' unsupported allegations, the undisputed evidence in this case indicates that the

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[12] Merely short shrift need be given to appellants' unsupported assertion—contained in only one sentence in their Brief [at 14], and not argued in the Court below—that Congress could reasonably assume that related households contain the persons with "the greatest need for assistance." Appellants' undocumented assertion is clearly erroneous; in fact, the opposite is true. Whenever different indigent families double up into one household, or whenever an unrelated person is permitted to live with a family, it is frequently because the families or persons are so poor that they need to share living expenses, particularly rent and food costs. It is usually the impoverished A.F.D.C. mother and her children, or the unemployed person, or migrant laborers—the poorest of the poor—who must double up with another family so that necessities, particularly shelter and nutrition, are more adequately provided. [Appendix, at 43] At any rate, it is peradventure clear that unrelated indigent households cannot be reasonably deemed less needy than related indigent households.

incidence and detection of fraud is essentially uneffected by the unrelated household provision. Persons intending to abuse the Program "can and will alter their living arrangements in order to remain eligible for food stamps" [Appendix, at 43]; but the poorest of the poor—the persons most substantially affected by the unrelated household provision and the ones least able to change their living arrangements—will be eliminated from food stamp relief in direct frustration of Congressional purposes.[13] As in *Dunn v. Blumstein*, 405 U.S. 330, 346

[13]Aside from frustrating the clearly expressed Program purposes in the Food Stamp Act's Declaration of Policy [7 U.S.C. §2011], the effect of the unrelated household provision runs completely counter to the purposes of the Act's 1971 amendments. Rather than substantially curtailing the availability of Program benefits to the poorest of the poor—as the unrelated household provision unwittingly accomplishes—the 1971 Food Stamp Act amendments sought to expand Program coverage and benefits. The 1971 amendments: (1) increased food stamp eligibility standards by raising the low state eligibility standards to a much higher uniform nationwide standard, thereby assisting several million additional poor persons [see 7 U.S.C. §2014(b) before and after the passage of P.L. 91-671, 84 Stat. 2048; Cong. Rec., 91st Cong., 2d Sess. (Daily edition, Dec. 31, 1970), at S21683 (statement by Senator McGovern); Cong. Rec., 91st Cong., 2d Sess. (Daily edition, Dec. 31, 1970), at S21694 (statement by Senator Dole)]; (2) permitted persons without income, for the first time, to obtain food stamps for free [see 7 U.S.C. §2016(b), before and after the passage of P.L. 91-671, 84 Stat. 2048; Cong. Rec., 91st Cong., 2d Sess. (Daily edition, Dec. 31, 1970), at S21682 (statement of Senator Ellender and Explanation of Food Stamp Conference Report); Cong. Rec., 91st Cong., 2d Sess. (Daily edition, Dec. 30, 1970), at H12543 (statement by Congressman Quie)]; (3) guaranteed that coupon allotments would be sufficient to obtain a "nutritionally adequate diet," rather than a diet that is "*more nearly*" sufficient [compare 7 U.S.C. §§2011, 2013(a) and 2016(a) before and after P.L. 91-671, 84 Stat. 2048]; (4) permitted the implementation of both the Food Stamp and

(1972)—where the Court concluded that "[s]ince false swearing [about having lived in the State for one year] is no obstacle to one intent on fraud, the existence of burdensome voting qualifications like durational residence requirements cannot prevent corrupt nonresidents from fraudulently registering and voting"—the unrelated household provision is unlikely to deter non-poor, corrupt individuals from cheating in the Food Stamp Program.

The only sections that are truly rationally related to the purpose of food stamp abuse prevention have, in contrast, "a fair and substantial relation to the object of the legislation." [*Reed v. Reed, supra*, 404 U.S., at 76; *Royster Guano Co. v. Virginia, supra*, 253 U.S., at 415] Those sections impose substantial criminal sanctions against persons who have perpetrated food stamp fraud [see 7 U.S.C. §§2023(b) and (c)] and require able-bodied persons to register for, and accept, work—or lose their food stamp entitlements. [7 U.S.C. §2014(c)] In contrast with the unrelated household provision, the prevention of Program abuses is "suitably furthered by the differential treatment" [*Police Department of Chicago v. Mosley, supra*, 408 U.S., at 95; citing *Reed v. Reed, supra*, 404 U.S., at 75-77; *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972); *Dunn v. Blumstein, supra*, 405 U.S., at 335] accorded in the criminal sanctions and forced work sections of the Food Stamp Act. Clearly the contrast in sections demonstrates how unreasonably the unrelated household provision is suited to the prevention of Program abuses.

Commodity Distribution Programs to occur in the same area under certain circumstances [7 U.S.C. §2013(b); see *Sloan v. United States Department of Agriculture*, 335 F. Supp. 816 (W.D. Wash. 1971)]; and (5) radically increased the appropriation authorization levels for the Food Stamp Program. [7 U.S.C. §2025(a)]

Appellants' sole justification for the provision, therefore, rests with their unsupported assertion that it is somehow more administratively cumbersome and costly to detect Program abuses in unrelated households. Although the undisputed evidence herein seems to belie this assertion [Appendix, at 43], it is well-settled that administrative convenience and preservation of the fisc do not independently justify discriminatory classifications. As the Court stated in *Stanley v. Illinois*, 405 U.S. 645, 656 (1972):

> The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.

Similarly, in *Shapiro v. Thompson, supra*, 394 U.S., at 633, the Court stated:

> We recognize that a State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens. It could not, for example, reduce expenditures for education by barring indigent children from its schools. Similarly, in the cases before us, appellants must do more than show that denying welfare benefits to new residents saved

money. The saving of welfare costs cannot justify an otherwise invidious classification.

See *Reed v. Reed*, 404 U.S. 71, 76-77 (1971); *Carrington v. Rash*, 380 U.S. 89, 96 (1965); *Bell v. Burson*, 402 U.S. 535, 540-541 (1971); *Dunn v. Blumstein*, 405 U.S. 330, 350-351 (1972). See also, *Goldberg v. Kelly*, 397 U.S. 254, 266 (1970).

In sum, appellants' search for a rational relationship, between the purposes of the Food Stamp Act and the unrelated household provision, has proved fruitless. It seems reasonable, therefore, that this wide-ranging search finally ends and that it is deemed clear that Congress, in its haste, passed a provision that does not reasonably further a legitimate governmental interest. Since the unrelated household provision so harmfully discriminates against the indigent appellees and their class, and since the discriminatory denial of crucial food relief is not founded in the reasonable furtherance of a legitimate governmental purpose, the provision violates appellees' rights to equal protection.

II.

THE DISCRIMINATORY FOOD STAMP UNRELATED HOUSEHOLD PROVISION, WHICH IMPINGES UPON APPELLEES' ASSOCIATION AND PRIVACY RIGHTS, IS NOT CONSTITUTIONALLY JUSTIFIED INSOFAR AS IT DOES NOT PROMOTE A COMPELLING GOVERNMENTAL INTEREST.

A. Discriminatory Governmental Action, That Impinges Upon Fundamental Rights, Is Unconstitutional Unless Such Action Is Necessary To Promote a Compelling Governmental Interest.

Whenever discriminatory governmental actions impinge upon fundamental personal rights or liberties, those actions are more closely scrutinized by the Federal Judiciary. If such actions are to be deemed Constitutional, they must not only be rationally related to a valid governmental purpose, but they must be *necessary to the achievement of a compelling governmental interest.* As the Supreme Court stated in *Harper v. Virginia Board of Education,* 383 U.S. 663, 670 (1966):

> We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined.

That a stricter test must be utilized, when discriminatory governmental action invades fundamental Constitutional rights, is well-settled by *Shapiro v. Thompson*, 394 U.S. 618 (1969). In that case, the Court invalidated the one-year durational residence requirements in the public assistance programs. The Court noted that the residence requirements deterred indigents from exercising their freedom to travel [394 U.S., at 629-631] and then held:

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> At the outset, we reject appellants' argument that a mere showing of a rational relationship between the waiting period and . . . permissible state objectives will suffice to justify the classification. [citing several cases] The waiting-period provision denies welfare benefits to otherwise eligible applicants solely because they have recently moved into the jurisdiction. But in moving from State to State or to the District of Columbia *appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional.* [394 U.S., at 634] (emphasis added)

Before and, more frequently, after the *Shapiro* decision, the Court has made manifestly clear that discriminatory governmental action, impinging upon fundamental rights and liberties, can only be justified if it promotes a compelling governmental interest. See, e.g., *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)–where the discriminatory governmental action impinged on the right to procreate; *Bullock v. Carter*, 405 U.S. 134, 144 (1972), *Dunn v. Blumstein*, 405 U.S. 330, 335-337 (1972), *Kramer v. Union Free School District*, 395 U.S. 621, 627-628 (1969), *Cipriano v. City of Houma*, 395 U.S. 701, 704 (1969), *Harper v. Virginia Board of Elections*, 383 U.S. 663, 670 (1966)–where the discriminatory governmental action impinged on the right to vote;[14] *Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968)–where the discriminatory governmental action impinged on the right to associate and the right to vote;[15] *Police Depart-*

[14] See, also, *Reynolds v. Sims*, 377 U.S. 533, 561-562, 565 (1964).

[15] See, also, *Boddie v. Connecticut*, 401 U.S. 371 (1971), and the explanation thereof in *United States v. Kras*, 41 U.S. L.W. 4117, 4121 (U.S., Jan. 10, 1973), wherein Justice Blackmun,

ment of the City of Chicago v. Mosley, 408 U.S. 92, 95, 98-99, 101 (1972)—where the discriminatory governmental action impinged on the free speech right to picket;[16] *Dunn v. Blumstein*, 405 U.S. 330, 338-343 (1972), *Graham v. Richardson*, 403 U.S. 365, 375-376 (1971), *Shapiro v. Thompson*, 394 U.S. 618, 629-631, 634 (1968)—where the discriminatory governmental action impinged on the right to travel; *Griffin v. Illinois*, 351 U.S. 12, 16-17 (1956), *Mayer v. City of Chicago*, 404 U.S. 189, 193-194, 196-197 (1971)—where the discriminatory action, denying trial court transcripts, impinged upon the right to appeal.[17] Clearly, therefore, the Court has uniformly and unequivocally held that discriminatory actions, impinging on fundamental rights and liberties, can only be justified if those actions are necessary to promote a compelling governmental interest.

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speaking for the Court, indicated that the discriminatory denial of access to divorce proceedings contested in *Boddie* was strictly scrutinized because it "touched directly . . . on the marital relationship and on the associational interests that surround the establishment and dissolution of that relationship." The Court went on to indicate that the "*Boddie* appellants' inability to dissolve their marriages seriously impaired their freedom to pursue other protected associational activities." [*id.*] Cf. *Loving v. Virginia*, 388 U.S. 1 (1967).

[16] Cf. *Niemotko v. Maryland*, 340 U.S. 268, 272 (1951) and *Cox v. Louisiana*, 379 U.S. 536, 557 (1965).

[17] The Court's decisions on the question of free transcripts for indigents include: *Wade v. Wilson*, 396 U.S. 282 (1970); *Williams v. Oklahoma City*, 395 U.S. 458 (1969); *Gardner v. California*, 393 U.S. 367 (1969); *Roberts v. LaVallee*, 389 U.S. 40 (1967); *Long v. District Court of Iowa*, 385 U.S. 192 (1966); *Rinaldi v. Yeager*, 384 U.S. 305 (1966); *Draper v. Washington*, 372 U.S. 487 (1963); *Lane v. Brown*, 372 U.S. 477 (1963); *Coppedge v. United States*, 369 U.S. 438 (1962); and *Eskridge v. Washington Prison Bd.*, 357 U.S. 214 (1958).

B. The Discriminatory Food Stamp Unrelated Household Provision Impinges Upon Appellees' Freedom of Association and Right to Privacy.

The coercive effects of the Food Stamp Act's unrelated household provision [7 U.S.C. §2012(e)] are very clear. Poor persons, who reside together in order to conserve their meager resources, are penalized by the appellants because they are unrelated to one another. Although they are very much in need of health-vital Federal food assistance, and although they are otherwise eligible for such relief, they are denied such aid solely because they live under the same roof with others who are unrelated to them. In short, the unrelated household provision directly and substantially interferes with appellees' freedom of association and right to privacy: the provision impinges on appellees' rights to lawfully associate with whomever they wish, in the confines of their own home, by denying them health-vital food aid as a result of their exercise of those rights. The results are tragic.

Appellee Jacinta Moreno, for example, must live with people unrelated to her if she is to survive. As a 56 year old diabetic with a total monthly income of $75, she is unable to face the economic and health rigors of daily life without substantial aid from others. By moving into the same house occupied by another (the Sanchez) family, she shares housing costs and is consequently able to live in decent accommodations for only $40 a month. But, after paying for utilities ($10 a month), bi-weekly visits to the hospital ($10 a month) and laundry ($5 a month), she has only $10 a month left for food, clothing, hygienic necessities, transportation costs, and all other necessities. Particularly since appellee Moreno requires a special diet for her health condition, she is in vital need of Federal

food assistance. As a result of the unrelated household provision, however, she must make the following Hobson's choice: *either* stay in the same household and be denied essential food relief, *or* receive food stamps and leave the household, thereby suffering new and severe economic and health problems.[18] [See Appendix, at 23-25]

For appellee Sheilah Ann Hejny, the options have been similarly tragic. Although her family is poor, appellee Hejny took in a young girl—Sharon Sharp—who was a former neighbor and was abandoned by her parents. Since Sharon had never lived in a home environment that provided her with love, care and security, moving in with the Hejny family was most helpful to Sharon's emotional, physical and psychological well-being. Unfortunately, solely as a result of Sharon's presence in the home, the Hejnys were disqualified from much-needed food stamp assistance. Therefore, they could either order Sharon out of the home in order to get food relief, or they could continue to live with her and remain undernourished. [See Appendix, at 28-31]

For appellee Victoria Keppler, the unrelated household provisions have left her also with very unfortunate alternatives. One of her daughters must attend a school for the deaf in Oakland in order to receive educational

[18] In many respects, the decision to live with the Sanchez family is not left entirely with appellee Moreno. Since the Sanchez family is poor, and has been relying on food stamp aid in order to sustain Mrs. Sanchez and her three youngsters, there is a great but tragic incentive to force Mrs. Moreno out of their house. [See Appendix, at 23-25] Under the unrelated household provisions in the Food Stamp Act and regulations promulgated pursuant thereto [7 U.S.C. §2012(e); 7 C.F.R. §§270.2(jj) and 271.3(a)], the Sanchez family is not permitted to receive food stamps as long as an unrelated person—such as appellee Moreno—lives with them.

instruction. However, the school is located in an area where rent costs are relatively high, and since appellee Keppler is a welfare recipient, she cannot afford to pay the rents there. Consequently, appellee Keppler's family moved into an apartment, not far from the school, with an unrelated woman friend who is also a welfare recipient and who has sought shared living expenses. By sharing the rent costs, they can barely pay for the rent. Although the Keppler family is very much in need of food stamp aid, Mrs. Keppler and her children—as a result of the unrelated household provision—can only get such relief if they move out of their home, thereby making it impossible for Mrs. Keppler's daughter to attend school. [See Appendix, at 26-27]

Clearly the unrelated household provision is not only harmful to appellees' severe economic plight, but the provision violates their freedom of association and rights to privacy. Faced with the brutal need of food relief for themselves and/or their loved ones, appellees are forced to surrender their fundamental right, to choose whom they wish to lawfully associate with in the confines of their home, or suffer grievous conditions of hunger and undernutrition. By penalizing appellees for exercising their inalienable freedom of association and right to privacy, the appellants are violating the Constitution.

It is well-settled that governmental action such as this, which deters or penalizes the exercise of Constitutional rights, is as defective as action that specifically prohibits the exercise of such rights. [See, e.g., *Sherbert v. Verner*, 374 U.S. 398, 404 (1963); *Dunn v. Blumstein*, 405 U.S. 330, 338-342 (1972); *Speiser v. Randall*, 357 U.S. 513 (1958); *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 155-156 (1946); *Flemming v. Nestor*, 363 U.S. 603, 611 (1960); *Shapiro v. Thompson*, 394 U.S. 618, 629, 634, 638, n. 21

(1969)] This Constitutional principle is applicable regardless of whether the deterrence or penalization flows from the conditional withdrawal of a right or a privilege.[19]

In *Sherbert v. Verner, supra,* a Seventh-Day Adventist had been denied unemployment compensation because she had refused to work on Saturday, the Sabbath Day of her faith. Benefits were denied because she allegedly "failed, without good cause ... to accept available suitable work when offered ... by the employment office or the employer." [374 U.S., at 401] Holding that the disqualification imposed a "burden upon the free exercise of appellant's religion," [374 U.S., at 403], the Court said:

> It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.[20] [374 U.S., at 404]

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[19] Constitutional rights cannot be bartered by the government for such benefits as unemployment compensation [*Sherbert v. Verner, supra*]; property tax exemptions [*Speiser v. Randall, supra*]; Social Security benefits [*Flemming v. Nestor, supra*]; the provision of second class mailing privileges [*Hannegan v. Esquire, Inc., supra*]; public welfare [*Shapiro v. Thompson, supra, Graham v. Richardson,* 403 U.S. 365 (1971)]; and government employment [*Mindel v. United States Civil Service Commission,* 312 F. Supp. 485 (N.D. Calif. 1970)].

[20] In a footnote, the Court cited other cases in which conditions and qualifications upon governmental privileges and benefits had been invalidated because of their tendency to "inhibit constitutionally protected activity." [374 U.S., at 404, n. 6]. The Court cited the following cases: *Steinberg v. United States,* 143 Ct. Cl. 1, 163 F. Supp. 590; *Syrek v. California Unemployment Ins. Board,* 54 Cal.2d 519, 354 P.2d 625; *Fino v. Maryland Employment Security Board,* 218 Md. 504, 147 A.2d 738; *Chicago Housing Authority v. Blackman,* 4 Ill.2d 319, 122 N.E.2d 522; *Housing Authority of Los Angeles v. Cordova,* 130 Cal. App.2d 883, 279

Similarly in *Shapiro v. Thompson, supra,* in which the one-year durational residence requirement for obtaining welfare assistance was invalidated because it violated equal protection and impinged on plaintiffs' freedom to travel, the Supreme Court said:

> If a law has "no other purpose . . . than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it [is] patently unconstitutional." (citing *United States v. Jackson,* 390 U.S. 570, 581 (1968)) [394 U.S., at 631]

Clearly this principle is applicable to the present case. The indigent appellees are denied vital Federal food sustenance solely because they have chosen to exercise their freedom of association and right to privacy. Appellees should not be penalized for exercising their fundamental right to lawfully associate with whomever they wish in the confines of their home, just as the litigants in *Shapiro* should not have been penalized for exercising their right to travel.

Although the "compelling governmental interest" test in *Shapiro* was triggered due to the penalization of the litigants' exercise of a fundamental right, appellants unreasonably and erroneously seek to distinguish the *Shapiro* case from the instant litigation. [See Appellants' Brief, at 10-11] After noting that the Court found that the *purpose* of the welfare residence requirements was "inhibiting migration by needy persons" [394 U.S., at 629], the appellants seek to distinguish *Shapiro* by asserting that "it is not the *purpose* of the statutory

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P.2d 215; *Lawson v. Housing Authority of Milwaukee,* 270 Wis. 269, 70 N.W.2d 605; *Danskin v. San Diego Unified School District,* 28 Cal.2d 536, 171 P.2d 885; *American Civil Liberties Union v. Board of Education,* 55 Cal.2d 67, 359 P.2d 45. Cf. *Baltimore v. A.S. Abell Co.,* 218 Md. 273, 145 A.2d 111.

classification here in question directly to inhibit exercise" of appellees' association and privacy rights. [See Appellants' Brief, at 11] (emphasis added). Appellants' reliance on the absence of invidious Congressional intentions, however, is misplaced. Surely Congress did not intend to impinge on fundamental Constitutional rights when it enacted this provision. But this provision (which the District Court correctly found was the product of "hasty, last minute Congressional action–'a child born of the silent union of legislative compromise' ",[21] [citing *Rosado v. Wyman*, 397 U.S. 397, 412 (1970); 345 F. Supp., at 315] *does in fact penalize* impoverished and hungry persons for the exercise of their association and privacy rights.

In a recent case, the Court was confronted with the same argument raised by the appellants herein, seeking to distinguish *Shapiro* by focussing on whether the Constitutional impingement was intended, rather than whether the exercise of a Constitutional right was penalized. In

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[21] That Congress never carefully considered the Food Stamp Act's unrelated household provision [7 U.S.C. §2012(e)] is obvious. Neither this provision, nor any other one vaguely similar thereto, was considered by either Congressional House until the Conference Committee bill was submitted just before the New Year's adjournment date. Neither the Senate bill [S. 2547] nor the House bill [H.R. 18582] contained a provision remotely analogous to the unrelated household provision. That provision was considered for the first time during the hasty, waning moments of the Ninety-first Congress when the Conference bill–containing numerous other provisions, many of them more controversial to the Congressmen and Senators–was submitted to both Houses. [See Cong. Rec. 91st Cong., 2d Sess. (Daily Edition, Dec. 30, 1970), at H 12541-H 12548]; Cong. Rec., 91st Cong., 2d Sess. (Daily Edition, Dec. 31, 1970), at S 21681-S 21694] Clearly this provision was not given careful consideration.

Dunn v. Blumstein, supra, wherein the Court considered the constitutionality of durational residence requirements for voting, the Court rejected this distinction; the Court held that it is merely necessary to demonstrate that the governmental action served to penalize the exercise of a Constitutional right:

> Tennessee attempts to distinguish *Shapiro* by urging that "the vice of the welfare statute in *Shapiro* . . . was its objective to deter interstate travel." Appellants' Brief 13. In Tennessee's view, the compelling state interest test is appropriate only where there is "some evidence to indicate a deterrence of or infringement on the right to travel . . . ." *Ibid.* Thus, Tennessee seeks to avoid the clear command of *Shapiro* by arguing that durational residence requirements for voting neither seek to nor actually do deter such travel. In essence, Tennessee argues that the right to travel is not abridged in any constitutionally relevant sense.
>
> This view represents a fundamental misunderstanding of the law. It is irrelevant whether disenfranchisement or denial of welfare is the more potent deterrent to travel. *Shapiro* did not rest upon a finding that denial of welfare actually deterred travel. Nor have other "right to travel" cases in this Court always relied on the presence of actual deterrence. In *Shapiro* we explicitly stated that the compelling state interest test would be triggered by "any classification which serves to *penalize* the exercise of that right [to travel] . . . ." *Id.*, at 634 (emphasis added); see *id.*, at 638 n. 21. While noting the frank legislative purpose to deter migration by the poor, and speculating that "[a]n indigent who desires to migrate . . . will doubtless hesitate if he knows that he must risk" the loss of benefits, *id.*, at 629, the majority found no need to dispute the

evidence that few welfare recipients have in fact been deterred [from moving] by residence requirements." *Id.*, at 650 (Warren, C.J., dissenting); see also *id.*, at 671-672 (Harlan, J., dissenting). Indeed, none of the litigants had themselves been deterred. Only last Term, it was specifically noted that because a durational residence requirement for voting "operates to *penalize* those persons, and only those persons, who have exercised their constitutional right of interstate migration . . ., [it] may withstand constitutional scrutiny only upon a clear showing that the burden imposed is necessary to protect a compelling and substantial governmental interest." *Oregon v. Mitchell*, 400 U.S., at 238 (separate opinion of Brennan, White, and Marshall, J.J.) (emphasis added)

> . . . The right to travel is an "*unconditional* personal right," a right whose exercise may not be conditioned. *Shapiro v. Thompson*, 394 U.S., at 643 (Stewart, J., concurring) (emphasis added); *Oregon v. Mitchell, supra*, at 292 (Stewart, J., concurring and dissenting, with whom Burger, C.J., and Blackmun, J., joined). Durational residence laws impermissibly condition and penalize the right to travel by imposing their prohibitions on only those persons who have recently exercised that right. [405 U.S., at 339-342]

Similarly, since the unrelated household provision at issue here penalizes indigents because they exercised their constitutionally-protected association and privacy rights, the provision can only withstand judicial scrutiny if it is necessary to promote a compelling governmental interest.

C. The Constitution Protects Appellees' Fundamental Freedom of Association.

The right to freedom of association has always been a fundamental guarantee of American society. De Tocqueville, in his famous treatise on early America, indicated how important freedom of association is to this country and any democratic society. In *Democracy in America*, he wrote:

> The most natural privilege of a man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and of acting in common with them. The right of association therefore appears to me almost as inalienable in its nature as the right of personal liberty. No legislator can attack it without impairing the foundations of society. [de Tocqueville, *Democracy in America*, Bradley ed. (1954), at 203]

As a result of its fundamental place in American society, freedom of association has been guaranteed by the Constitution's Bill of Rights. As evidenced by a multitude of decisions, the inalienable right of freedom of association has been most vigilantly protected by the Supreme Court.[22] As Justices Black and Douglas stated in their concurring opinion in *Bates v. City of Little Rock*, 361 U.S. 516, 528 (1960):

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[22] See, e.g., *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 460-461 (1958); *Shelton v. Tucker*, 364 U.S. 479, 486 (1960); *Louisiana ex rel. Gremillion v. N.A.A.C.P.*, 366 U.S. 293, 296 (1961); *N.A.A.C.P. v. Button*, 371 U.S. 415, 428-429 (1963); *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539, 543 (1963); *Aptheker v. Secretary of State*, 378 U.S. 500, 518 (1964) (Black, J., concurring opinion); *United States v. Robel*, 389 U.S. 258, 263, n. 7 (1967); *Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968); *Baird v. State Bar of Arizona*, 401 U.S. 1, 6 (1971).

> [F]irst Amendment rights are beyond abridgement either by legislation that directly restrains their exercise or by suppression or impairment through harassment, humiliation or exposure by government. One of those rights, freedom of assembly, includes, of course, freedom of association; and it is entitled to no less protection than any other First Amendment right as *N.A.A.C.P. v. Alabama,* 357 U.S. 449, at 460, and *Dejonge v. Oregon,* 299 U.S. 353, at 363, hold. These are principles applicable to all people under our Constitution irrespective of their race, color, politics or religion.

The right to freedom of association has been deemed so fundamental by the Court that State encroachment thereon has been protected by the due process clause of the Fourteenth Amendment.[23] [See, e.g., *N.A.A.C.P. v. Alabama,* 357 U.S. 449, 460-461 (1958); *Louisiana ex rel. Gremillion v. N.A.A.C.P.,* 366 U.S. 293, 296 (1961); *N.A.A.C.P. v. Button,* 371 U.S. 415, 428-429 (1963); *Gibson v. Florida Legislative Investigation Committee,* 372 U.S. 539, 543 (1963).]

In *Williams v. Rhodes, supra,* the Court considered a challenge to Ohio's election laws; those laws made it virtually impossible for a new political party (even though it had hundreds of thousands of members), or an old party, to be placed on state ballots to choose electors pledged to particular Presidential and Vice-Presidential candidates. The plaintiffs in that case challenged the Ohio laws as being violative of equal protection, particularly insofar as those laws impinged upon the fundamental rights to vote and to associate. The Court agreed:

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[23]Similarly, therefore, the Fifth Amendment—as well as the First and Ninth Amendments—would protect individuals from Federal encroachment on their associational rights. Cf. *United States v. Tarlowski,* 305 F. Supp. 112, 121 (E.D. N.Y. 1969).

> In the present situation the state laws place burdens on two different, although overlapping, kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights, of course, rank among our most precious freedoms. We have repeatedly held that freedom of association is protected by the First Amendment. And of course this freedom protected against federal encroachment by the First Amendment is entitled under the Fourteenth Amendment to the same protection from infringement by the States. [393 U.S., at 30-31]

As a result of the impingement on plaintiffs' association rights (as well as the right to vote), the defendants could only uphold the discriminatory laws by showing that they promoted a compelling governmental interest. [*Id.*]

Although the above-cited decisions have guaranteed persons' freedom of association in the context of political and social expression, this inalienable freedom has been constitutionally protected in other contexts as well. Thus, similar to the appellees in this case, the First Amendment has guaranteed people's rights to join together in order to improve their economic plight. The First Amendment, therefore, has protected people's rights to join a union and to participate in its activities. As the Supreme Court stated: "The Constitution protects the associational rights of the members of the union, precisely as it does those of the N.A.A.C.P."[24] [*Brother-*

[24] In *McLaughlin v. Tilendis*, 398 F.2d 287, 289 (7th Cir. 1968), the Seventh Circuit stated that "[u]nless there is some illegal intent, an individual's right to form and join a union is protected by the First Amendment [citing, *inter alia*, *Thomas v. Collins*, 323 U.S. 516, 534 (1945); *Hague v. C.I.O.*, 307 U.S. 496, 512, 519, 523-524 (1939); *Griswold v. Connecticut*, 381 U.S. 479, 483

hood of R.R. Trainmen v. Virginia ex rel. Virginia State Bar, 377 U.S. 1, 8 (1964); see, also *United Mine Workers v. Illinois State Bar Association,* 389 U.S. 217 (1967); *United Transportation Union v. State Bar of Michigan,* 401 U.S. 576 (1971).

If membership in a labor union, to improve one's economic status, is Constitutionally protected, then indigents' rights to membership in a household, for the economic necessity of preserving meager resources, should also be Constitutionally protected by the guarantee of freedom of association. Certainly laborers' and professionals' rights, to join together for economic purposes, are no more sacred than poor people's rights to do the same. Consequently, the impoverished appellees' right to live with persons unrelated to them, to protect against severe economic hardship, is protected by the First Amendment.

(1965)]." Consequently, the Circuit Court held that:

> Teachers have the right of free association, and unjustified interference with teachers' associational freedom violates the Due Process Clause of the Fourteenth Amendment. [398 F.2d, at 288]

Similarly in *Atkins v. City of Charlotte*, 296 F. Supp. 1068, 1075 (W.D.N.C. 1969), the District Court said:

> The Supreme Court of the United States has accorded freedom of association full status as an aspect of liberty protected by the Due Process Clause of the Fourteenth Amendment and by the rights of free speech and peaceful assembly explicitly set out in the First Amendment.

Consequently, the Court held:

> Our ultimate conclusion: That the firemen of the City of Charlotte are granted the right of free association by the First and Fourteenth Amendments of the United States Constitution; that the right of association includes the right to form and join a labor union whether local or national . . . [296 F. Supp., at 1077]

More recently, the Court has made it evidently clear that the fundamental right to freedom of association extends to personal, as well as political-economic, relationships.[25] In *Griswold v. Connecticut*, 381 U.S. 479 (1965), wherein married persons' right to use contraceptives was protected, the Court indicated that the personal right to freedom of association emanates from, and is penumbral to, the First Amendment. The Court stated:

> The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. [citing *Poe v. Ullman*, 367 U.S. 497, 516-522 (1961) (dissenting opinion)] Various guarantees create zones of privacy. *The right of association contained in the penumbra of the First Amendment is one.* [381 U.S., at 483-484] (emphasis added)

The associational right protected by the Court in *Griswold* was marriage. The Court noted that:

> Marriage is a coming together for better or for worse .... It is an *association* that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects.

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[25] In an article in the Yale Law Journal, Professor Thomas Emerson persuasively argued that personal associations, of the sort here under consideration, are more appropriate objects of the First Amendment's protections than the political-economic associations traditionally safeguarded:

> [I]n situations where the government undertakes to prohibit personal associations, a doctrine of "the right of association" comes closest to providing a useful tool for decision. . . . The reason is that in this situation—an official proscription of personal association—the right to associate in its literal meaning comes nearest to being an absolute right, untouchable by government power. [Emerson, "Freedom of Association and Freedom of Expression," 74 Yale L.J. 1, 20, (1964)]

> Yet it is an *association* for as noble a purpose as any involved in our prior decisions. [381 U.S., at 486] (emphasis added)

That associations, involving relationships other than marriage, are also protected by the Court is clear from a recent analogous decision safeguarding unmarried persons' right to contraceptives. In *Eisenstadt v. Baird,* 405 U.S. 438 (1972), the Court held that the protection accorded in *Griswold* to married couples is equally applicable to unmarried couples. The Court said:

> If under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. [405 U.S., at 453]

More recently, and more directly on point, is the Court's discussion of *Boddie v. Connecticut,* 401 U.S. 371 (1971), in *United States v. Kras,* 41 U.S.L.W. 4117 (U.S., Jan. 10, 1973). In that case, Justice Blackmun, writing for the Court, reasoned why the assessment of filing fees on indigent potential litigants–thereby frequently making it impossible for them to initiate legal proceedings–was constitutionally permissible in bankruptcy cases (the subject matter in *Kras*) but not in divorce actions (the subject matter in *Boddie*). As one of the major grounds for distinguishing the two legal proceedings, the Court noted that divorce actions touch upon individuals' freedom of association, while bankruptcy proceedings do not involve such fundamental rights. Consequently, the equal protection argument raised in *Boddie* was more strictly scrutinized than the equal protection claim in *Kras.* The Court stated:

> The appellants in *Boddie,* on the one hand, and Robert Kras, on the other, stand in materially different postures. The denial of access to the

judicial forum in *Boddie* touched directly, as has been noted, on the marital relationship *and on the associational interests that surround the establishment and dissolution of that relationship. On many occasions we have recognized the fundamental importance of these interests under our Constitution.* See, for example, *Loving v. Virginia,* 388 U.S. 1 (1967); *Skinner v. Oklahoma,* 316 U.S. 535 (1942); *Griswold v. Connecticut,* 381 U.S. 479 (1965); *Eisenstadt v. Baird,* 405 U.S. 438 (1972); *Meyer v. Nebraska,* 262 U.S. 390 (1923). The *Boddie* appellants' inability to dissolve their marriages seriously impaired *their freedom to pursue other protected associational activities.* Kras' alleged interest in the elimination of his debt burden, and in obtaining his desired new start in life, although important and so recognized by the enactment of the Bankruptcy Act, does not rise to the same constitutional level.[26] [41 U.S.L.W., at 4121] (emphasis added)

Similarly appellees' personal and fundamental right, to freely and lawfully associate with whomever they wish in the confines of their own homes, must receive this Court's most vigilant protection. If freedom of association is to retain its Constitutional vitality, it most assuredly must be protected in the instant situation.

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[26]See, also, *Mindel v. United States Civil Service Commission,* 312 F. Supp. 485 (N.D. Calif. 1970), where the District Court held that it is constitutionally impermissible to remove a postal clerk from his job just because he lives with a woman to whom he is not married.

D. Appellees' Lawful Associational Activities, in the Sanctity of Their Homes, Are Constitutionally Protected From Governmental Invasion.

Fundamental to a democratic society and the Constitution is the privacy right of people, when engaged in lawful activity, to be secure in their homes from governmental invasion. That this personal right of privacy is most important to, and an integral part of, a democratic society was carefully explained by Professor Emerson:

> The concept of limited government has always included the idea that governmental powers stop short of certain intrusions into the personal life of the citizen. This is indeed one of the basic distinctions between absolute and limited government. Ultimate and pervasive control of the individual, in all aspects of his life, is the hallmark of the absolute state. In contrast, a system of limited government safeguards a private sector, which belongs to the individual, firmly distinguishing it from the public sector, which the state can control. Protection of this private sector—protection, in other words, of the dignity and integrity of the individual—has become increasingly important as modern society has developed. All the forces of a technological age, industrialization, urbanization, and organization—operate to narrow the area of privacy and facilitate intrusions into it. In modern terms the capacity to maintain and support this enclave of private life marks the difference between a democratic and a totalitarian society. [Emerson, "Nine Justices in Search of a Doctrine," 64 Mich. L. Rev. 219, 229 (1965)]

Due to this fundamental aspect of a democratic society, the Court has vigilantly protected individuals' privacy

rights in the confines of their homes. Under the rubric of the right to privacy, the home traditionally has had an exalted place in our Constitutional framework and, therefore, has remained inviolate from governmental interference. The special status of the home as the primary locus of the right to privacy is supported by a venerable legal tradition. In *Miller v. United States*, 357 U.S. 301 (1958), the Court drew upon this tradition:

> From earliest days, the common law drastically limited the authority of law officers to break the door of a house to effect an arrest. Such action invades the precious interest of privacy summed up in the ancient adage that a man's house is his castle. As early as the 13th Yearbook of Edward IV (1461-1483), at folio 9, there is a recorded holding that it was unlawful for the sheriff to break the doors of a man's house to arrest him in a civil suit in debt or trespass, for the arrest was then only for the private interest of a party. Remarks attributed to William Pitt, Earl of Chatham, on the occasion of debate in Parliament on the searches, incident to the enforcement of an excise on cider, eloquently expressed the principle: "The poorest man may in his cottage bid defiance to all the forces of the crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter—all his forces dare not cross the threshold of the ruined tenement."[27] [357 U.S., at 306-307]

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[27] In *Stanley v. Georgia*, 394 U.S. 557, 564 (1969), and in *Eisenstadt v. Baird*, 405 U.S. 438, 453-454, n. 10 (1972), the Court stated:

> [A]lso fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusion into one's privacy.

Although one's privacy rights–to be safeguarded from governmental interference (particularly while engaged in lawful conduct that is neither anti-social nor immoral) in the sanctity of one's home–are not specifically articulated in the Bill of Rights, they are clearly protected by the Constitution. The traditional sanctity of the home has been accorded scrupulous protection by the Constitution through various provisions in the Bill of Rights. As the Court recognized in *Griswold v. Connecticut*, 381 U.S. 479 (1965), the right to privacy, particularly in the home, is penumbral to the First, Third, Fourth, Fifth and Ninth Amendments:

> Various guarantees create zones of privacy. The right to association contained in the penumbra of the First Amendment is one .... The Third Amendment in its prohibition against the quartering of soldiers "*in any house*" ... is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their *persons, houses, papers and effects*, against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his

"The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone–the most comprehensive of rights and the right most valued by civilized man." *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J. dissenting)

See *Griswold v. Connecticut, supra*; cf. *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 462 (1958).

detriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." [381 U.S. at 484] (emphasis added)

The *Griswold* decision, however, was not the first or only indication that the right to privacy (particularly in the confines of one's home) is penumbral to the Bill of Rights. Thus, the right to privacy was pertinent in protecting individuals' rights in several First Amendment cases. See, e.g., *Stanley v. Georgia,* 394 U.S. 557 (1969), where the right to possess obscene materials in the privacy of one's home was protected[28] [see, also, *United States v. Dellapia,* 433 F.2d 1252, 1255-1257 (2d Cir. 1970)]; *Gibson v. Florida Legislative Investigation Committee,* 372 U.S. 539 (1963), and *N.A.A.C.P. v. Alabama,* 357 U.S. 449 (1958), where the rights to "privacy in one's associations" [357 U.S., at 462] were protected by preventing the States of Florida and Alabama from obtaining the names of members in a civil rights organization. Cf. *Breard v. Alexandria,* 341 U.S. 622 (1951), where the Court protected individuals from unsolicited canvassing at their homes.

It is also clear that the underlying basis of the Third and Fourth Amendments, by their explicit terms, is the right to privacy and the sanctity of the home. Thus, in *Mapp v. Ohio,* 367 U.S. 643 (1961), which applied the

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[28] In *Stanley v. Georgia, supra,* the Court held:

Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the *privacy of one's own home.* If the First Amendment means anything, it means that a State has no business telling a man, *sitting alone in his own house,* what books he may read or what films he may watch. [394 U.S., at 565] (emphasis added)

exclusionary rule to an unlawful search, the Court said that it was protecting a "right to privacy, no less important than any other right carefully and particularly reserved to the people." [367 U.S., at 656] In *Boyd v. United States,* 116 U.S. 616 (1886), the Court referred to the Fourth and Fifth Amendments as protecting a person's security and liberty in the confines of his home. The Court, also, indicated how fundamental those rights are:

> The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach further than the concrete form of the case then before the Court . . . .; they apply to all invasions on the part of the government and its employees, *of the sanctity of a man's home and the privacies of life.* It is not the breaking of his doors and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense . . .[29] [116 U.S., at 630] (emphasis added)

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[29] Prior to *Boyd,* in *Kibourn v. Thompson,* 103 U.S. 168, 195 (1880), Justice Miller held for the Court that neither House of Congress "possesses the general power of making inquiry into the private affairs of the citizen." Justice Field later commented about *Kibourn*: "This case will stand for all time as a bulwark against the invasion of the right of the citizen to protection in his private affairs against the unlimited scrutiny of investigation by a Congressional committee." *In re Pacific Ry. Commission,* 32 F. 241, 253 (9th Cir. 1887) [cited with approval in *Sinclair v. United States,* 279 U.S. 263, 292 (1929)] Justice Harlan, also speaking for the Court, indicated that the same principle applies to administrative inquiries, indicating that the Constitution prohibited a "general power of making inquiry into the private affairs of the citizen." *Interstate Commerce Commission v. Brimson,* 154 U.S. 447, 478 (1894).

In *Miller v. United States,* 357 U.S. 301 (1958), where law officers broke down a door to enter a defendants' home, the Court said:

> Every householder, the good and the bad, the guilty and the innocent, is entitled to the protection designed to secure the common interest against unlawful invasion of the house. [357 U.S., at 313]

See, also, *In re Labady,* 326 F. Supp. 924 (S.D.N.Y. 1971), wherein District Judge Mansfield held that a homosexual man could not be denied naturalization for failure to demonstrate "good moral character" [8 U.S.C. §1427(a)]—despite the District Court's "general 'revulsion' or 'moral conviction or instinctive feeling' against homosexuality" [326 F. Supp., at 927]—because the petitioner conducted his homosexual activities behind locked doors in his hotel room, thereby protecting his privacy rights from governmental interference. [*Id.*, at 926-928]

Very recently, the Court indicated that individual's rights to privacy can be founded in the concept of personal liberty contained in the due process clause. In *Roe v. Wade,* 41 U.S.L.W. 4213 (U.S., Jan. 22, 1973), the recent decision protecting women's rights to abortions, the Court clearly stated that fundamental personal rights—such as the ones here at issue—are constitutionally protected under the rubric of the right to privacy. Justice Blackmun, writing for the Court, stated:

> The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back perhaps as far as *Union Pacific R. Co. v. Botsford,* 141 U.S. 250, 251 (1891), the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts the

Court or individual Justices have indeed found at least the roots of that right in the First Amendment, *Stanley v. Georgia,* 394 U.S. 557, 564 (1969); in the Fourth and Fifth Amendments, *Terry v. Ohio,* 392 U.S. 1, 8-9 (1968), *Katz v. United States,* 389 U.S. 347, 350 (1967), *Boyd v. United States,* 116 U.S. 616 (1886), see *Olmstead v. United States,* 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); in the penumbras of the Bill of Rights, *Griswold v. Connecticut,* 381 U.S. 479, 484-485 (1965); in the Ninth Amendment, *id.,* at 486 (Goldberg, J., concurring); or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment, see *Meyer v. Nebraska,* 262 U.S. 390, 399 (1923). These decisions make it clear that only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty," *Palko v. Connecticut,* 302 U.S. 319, 325 (1937), are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage, *Loving v. Virginia,* 388 U.S. 1, 12 (1967), procreation, *Skinner v. Oklahoma,* 316 U.S. 535, 541-542 (1942), contraception, *Eisenstadt v. Baird,* 405 U.S. 438, 453-454 (1972); *id.,* at 460, 463-465 (White, J., concurring), family relationships, *Prince v. Massachusetts,* 321 U.S. 158, 166 (1944), and child rearing and education, *Pierce v. Society of Sisters,* 268 U.S. 510, 535 (1925), *Meyer v. Nebraska, supra.* [41 U.S.L.W., at 4225]

Certainly appellees' rights to privacy—to associate in their homes with unrelated peopel—is fundamental and implicit in the concept of personal liberty. If the Constitution protects individuals' privacy rights: to obtain and use obscene materials in the home [*Stanley v. Georgia, supra*]; to associate with others to effectuate political purposes [*N.A.A.C.P. v. Alabama, supra* and

Gibson v. Florida Legislative Investigation Committee, supra]; to get married [*Loving v. Virginia, supra*]; to use contraceptives in the home [*Griswold v. Connecticut, supra* and *Eisenstadt v. Baird, supra*]; to procreate [*Skinner v. Oklahoma, supra*]; to engage in homosexual acts in a hotel room [*In re Labady, supra*]; to get an abortion [*Roe v. Wade, supra*]; and to have security in the home from unwarranted governmental intrusion even after having committed a crime [*Mapp v. Ohio, supra*], then most assuredly the appellees are Constitutionally protected from governmental intrusion when they live together with unrelated people. This is particularly true where, as here, the association in the home is continued lawfully and peaceably and without the taint of any anti-social activity.

That this right to privacy extends to the relationship of unrelated individuals is manifestly clear from two very recent decisions. In *Eisenstadt v. Baird, supra,* the Court granted a writ of *habeas corpus* to a petitioner who had been jailed because he provided contraceptives to an unmarried woman. After holding that the petitioner had standing to raise the privacy rights of the unmarried woman [405 U.S., at 443-446], the Court turned to the substantive claims. The Court held that the right to privacy of unmarried individuals is just as sacrosanct as the privacy right of married couples:

> If under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional make-up. If the right of

> privacy means anything, it is the right of the *individual,* married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child [405 U.S., at 453]

Similarly in *United States v. Kras, supra,* Justice Blackmun, for the Court, explained that the decision in *Boddie v. Connecticut,* 401 U.S. 371 (1971)–prohibiting the imposition of filing fees on indigents when they seek to initiate divorce proceedings–touched directly "on the marital relationship and on *the associational interests that surround* the establishment and *dissolution of that relationship.*" [41 U.S.L.W., at 4121] (emphasis added). Justice Blackmun concluded that the "*Boddie* appellants' inability to dissolve their marriage seriously *impaired their freedom to pursue other protected associational activities.*"[30] [*Id.*] (emphasis added) Similarly here, the right to privacy extends to the associational activities of unrelated persons in the confines of their homes–many, if not most, of whom have gotten together solely as a result of severe economic hardship.

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[30] Similarly in *Mindel v. United States Civil Service Commission,* 312 F. Supp. 485 (N.D. Calif. 1970), the District Court ruled on the privacy rights of an unmarried couple. In that case, the plaintiff was fired from his job as a postal clerk because he lived with a woman to whom he was not married. The Court held that the firing of the plaintiff constituted a violation of his privacy rights and ordered that he be reassigned to his job. In so doing, the Court, citing *Griswold,* said that "even in cases where it [the government] has a legitimate interest, it may not invade 'the sancity of a man's home and the privacies of life.' " [312 F. Supp., at 488] Cf. *Norton v. Macy,* 417 F.2d 1161, 1164 (D.C. Cir. 1969).

E. No Compelling Governmental Interest Is Actually Promoted by the Discriminatory Unrelated Household Provision in the Food Stamp Act.

Only two asserted purposes are allegedly served by the discriminatory unrelated household provision in the Food Stamp Act [7 U.S.C. §2012(e)]: (1) the elimination of food stamp aid from so-called "hippy" households; and (2) the prevention of fraud and other Program abuses. [Appellants' Brief, at 14-15] As for the first purpose, it is clear that the Government may not discriminate against so-called "hippies", even if that category of persons could be defined with reasonable precision[31]; persons cannot be discriminated against on the basis of length of hair or any other personal attribute that is unrelated to the relevant statute's, or Program's, purposes.[32] At any rate, it is obvious that discriminating against "hippies" is not a "compelling governmental interest." Moreover, the undis-

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[31] See *Parr v. Municipal Court*, 3 Cal. 3d 861, 92 Cal. Rptr. 153, 479 P.2d 353 (1971), where the California Supreme Court struck down an ordinance directed against so-called "hippies".

[32] That persons cannot be discriminated against based on personal attributes that are unrelated to a program's purposes is clear. See *Reed v. Reed*, 404 U.S. 71 (1971) and *Stanley v. Illinois*, 405 U.S. 645 (1972)–discrimination on the basis of sex; *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), *Korematsu v. United States*, 323 U.S. 214 (1944) and *Graham v. Richardson*, 403 U.S. 365 (1971)–discrimination on the basis of nationality; *Levy v. Louisiana*, 391 U.S. 68 (1968) and *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972)–discrimination on the basis of illegitimacy; *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966)–discrimination on the basis of wealth; *Brown v. Board of Education*, 347 U.S. 483 (1954)–discrimination on the basis of race; *Schneider v. Rusk*, 377 U.S. 163 (1964)–discrimination on the basis of alienage.

puted evidence before this Court indicates that it is not the "hippies" who are hurt by the unrelated household provision, it is the poorest of the poor who are most harmfully affected—those persons and families who must double up to pay for rent and other necessities, unemployed persons and migrants. [See Appendix, at 43]

Although the alleged second purpose of the provision—the prevention of fraud and other possible Program abuses—is important, that purpose is not reasonably promoted by the unrelated household provision. Since the unrelated household provision impinges on fundamental Constitutional rights, it does not reasonably or permissibly promote the purpose of Program abuse prevention because: (1) it is improperly tailored for that objective, being unreasonably overly and underly broad[33]; and (2) there are significant alternative methods that can be utilized to accomplish the alleged statutory purpose.[34]

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[33]If discriminatory enactments impinge on fundamental rights, such laws can only withstand Constitutional scrutiny if they are properly tailored to actually promote a compelling governmental interest; they cannot be overly or underly broad in promoting those objectives: [See, e.g., *Police Department of the City of Chicago v. Mosley*, 408 U.S. 92, 101 (1972); *Williams v. Rhodes*, 393 U.S. 23, 32-34 (1968); *Dunn v. Blumstein*, 405 U.S. 330, 343, 351-352 (1972); *Shapiro v. Thompson*, 394 U.S. 618, 631 (1969); *Eisenstadt v. Baird*, 405 U.S. 438, 454 (1972).]

[34]Governmental action that impinges on fundamental rights will not survive judicial scrutiny if there are alternative means available to achieve the alleged compelling governmental interests. [See, e.g., *Dunn v. Blumstein*, 405 U.S. 330, 353-354 (1972); *Police Department of the City of Chicago v. Mosley*, 408 U.S. 92, 101, n. 8 (1972). See, also, *Shelton v. Tucker*, 364 U.S. 479, 488 (1960); *Schneider v. State*, 308 U.S. 147, 164 (1939); *Harman v. Forssenius*, 380 U.S. 528, 543 (1965).]

That the provision is overly and underly broad is manifestly clear. Nothing in the nature of households composed of families together with unrelated persons, or several unrelated people living together, has anything to do with the perpetration of fraud or any other Program abuses. Affluent persons inclined to cheat in a poor people's program are as likely to be found in single family households as they are in unrelated households. No evidence has or can be found that Program abuses are more likely to occur, let alone only occur, in unrelated households. To the contrary. The undisputed evidence in this case demonstrates that unrelated households are usually more needy; and that ineligible, non-needy persons—who seek to wrongfully benefit from the Government's food relief to the poor—will try to defraud the Program without regard to whether they live in a single family, or an unrelated, household. [See Appendix, at 43]

Moreover, alternative methods for preventing Program abuse are available to the Government. Indeed, as in *Dunn v. Blumstein*, 405 U.S. 330, 353-354 (1972), the relevant statutory scheme already contains a provision to prevent fraud. Pursuant to sections 14(b) and 14(c) of the Food Stamp Act [7 U.S.C. §§2023(b) and (c)], there are strict penalties exacted against perpetrators of food stamp fraud. The provisions state:

> (b) Whoever knowingly uses, transfers, acquires, alters, or possesses coupons or authorization to purchase cards in any manner not authorized by this Act or the regulations issued pursuant to this Act shall, if such coupons or authorization to purchase cards are of the value of $100 or more, be guilty of a felony and shall, upon conviction thereof, be fined not more than $10,000 or imprisoned for not more than five years or both, or, if such coupons or

authorization to purchase cards are of a value of less than $100, shall be guilty of a misdemeanor and shall upon conviction thereof, be fined not more than $5000 or imprisoned for not more than one year, or both.

(c) Whoever presents, or causes to be presented, coupons for payment or redemption of the value of $100 or more, knowing the same to have been received, transferred, or used in any manner in violation of the provisions in this Act or the regulations issued pursuant to the Act, shall be guilty of a felony and shall, upon conviction thereof, be fined not more than $10,000 or imprisoned for not more than five years or both, or, if such coupons are of a value less than $100, shall be guilty of a misdemeanor and shall, upon conviction thereof, be fined not more than $5,000 or imprisoned for not more than one year, or both.

In addition to the criminal sanctions against fraud, the Food Stamp Act unequivocally requires that all able-bodied persons between the ages of 18 and 65, with very limited exceptions, must register for, and accept, work that may be offered to them. [7 U.S.C. §2014(c)]

In short, the unrelated household provision—which so harmfully impinges on poor people's rights to association and privacy, and which causes many of the poorest of the poor to lose their only access to nutritional adequacy—is not necessary or reasonably suited to promote any compelling governmental interest. The provision defeats the clearly articulated purposes of the Program [7 U.S.C. §2011] and unconstitutionally tramples upon the impoverished appellees' fundamental rights. Consequently, the unrelated household provision in the Food Stamp Act [7 U.S.C. §2012(e)] violates appellees' rights to equal protection, as protected by the Fifth Amendment to the Constitution.

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be affirmed.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JACINTA MORENO, et al.,	:	
Plaintiffs,	:	
v.	:	Civil Action
	:	No. 615-72
DEPARTMENT OF AGRICULTURE, et al.,	:	
Defendants.	:	

Washington, D.C., April 5, 1972

BEFORE THE HONORABLE JOHN LEWIS SMITH, JR., United States District Court Judge, Motion for a Temporary Restraining Order.

APPEARANCES:

RONALD F. POLLACK, Esq., M.B. TRISTER, Esq., and ROGER A. SCHWARTZ, Esq., for the Plaintiffs.

PETER J.P. BRICKFIELD, Esq., for the Government.

[2] PROCEEDINGS

MR. BRICKFIELD: If it please the Court, we are here, of course, on a question of a temporary restraining order as opposed to a final determination on the merits.

It has often been held that there are four grounds to be considered for a granting of preliminary relief and the leading case, of course, is the Virginia Petroleum Jobbers case and these four grounds were reaffirmed quite recently by this Circuit in the Delaware and Hudson Railway case in 1971.

These, of course, are concerned with the consideration of the probability of success on the merits, the question

of irreparable injury, as opposing counsel has stated, the question of preservation of the status quo and the question of balancing the interests and equities.

We propose to treat these issues seriatim. We do contend that the Court is without jurisdiction.

We are aware that there have been cases in which the District Courts have assumed jurisdiction and in the Hernandez case referred to by Plaintiffs, the Court did assume jurisdiction and that case, however, was dismissed as moot and the three judge court did not consider this particular matter.

[3] In a very recent case, the Second Circuit in Rizzo versus Kirby, 453 Fed. 2d, in a case questioning the distribution of food stamps for poor people, although admittedly they were not federal defendants there, but the Court declined jurisdiction holding that under 1331 and 1337 of the Judicial Code, the Plaintiffs could not compile their claims, to aggregate their claims, to reach the $10,000 jurisdictional amount.

Concerning the invasion of privacy, we are not concerned here with the criminal question as in Mapp versus Ohio or certain other cases concerning possession of obscene literature.

We have no criminal penalities for these people. It is merely a question of the constitution of their household.

We have no physical invasion here as we had in that case.

The Department of Agriculture is not going into these homes. They are not having unlawful and unwarranted searches and seizures.

Taking the two cases that Plaintiffs refer to, Mindel, the case of the post office worker, and as the Court knows the only grounds for removal of a federal official with tenure is for the efficiency of the service.

Mr. Mindel was charged with immoral conduct and we [4] submit that the true rationale of that case in this day and age, a man living with a woman without the benefit of marriage, perhaps does not constitute, at least in some quarters, immoral conduct.

In the Eisenstadt case, we have once again a criminal matter, the distribution of contraceptives which the courts always have considered to be much more restrictive than civil respect.

On the question of privacy and the right to associate, we have not nor do we question the morality of the Plaintiffs.

For a close comparison, I am reminded of the Internal Revenue Code of two young people that get different tax benefits, advantages, by being married than by being not married. This is not, we feel, a question of an invasion of privacy.

The Congress has, in the Internal Revenue Code, determined that young people, being given the benefit of marriage, are paying certain rates and those without marriage are paying other rates.

THE COURT: Are you familiar with the man in the house rule for welfare payments?

MR. BRICKFIELD: Yes, Your Honor.

THE COURT: What comment do you want to make on that?

MR. BRICKFIELD: I do not feel that that is [5] particularly applicable in this case.

We have a question where Congress has taken a benefit, the food stamp benefit, and they have given these benefits to certain citizens and in the Dandridge case in the State of Maryland where the question was the extent of benefits, the Supreme Court held that it matters not whether Congress solves the whole problem, but merely that Congress attempts to solve the problem and goes just

so far in solving the problem that the statute should not be stricken down.

THE COURT: What is the purpose of the Food Stamp Act?

MR. BRICKFIELD: To alleviate malnutrition and hunger amongst certain groups.

Now, there are economic limits on who is eligible and certainly it would be a difficult question to say a person making $1 a month more than the limit Congress has put on it should not get food stamps or should get food stamps.

A limit must be put on it. The resources of Congress are final and in this day and age–

THE COURT: This is not a question of limit as to monetary benefit. It is the question of relationship, is it not?

MR. BRICKFIELD: Yes, it is.

THE COURT: How is the regulation rationally related [6] to the Act?

MR. BRICKFIELD: Your Honor–

THE COURT: The purposes of the Act?

MR. BRICKFIELD: It is rational to the extent that the Act goes so far and no farther. It is a question of Congress stopping after giving so many people so much benefit and what we feel Plaintiffs are complaining of here, they did not get in and they are not included and admittedly, some Plaintiffs were included previously, but Congress just has not gone quite that far, and I think Congress can choose how far to go and how far not to go in granting benefits of this nature.

Until recently Puerto Rico did not receive equal–did not receive social security benefits. There are certain social security benefits that the citizens of Puerto Rico do not receive and this was challenged quite recently

and it is on appeal before the First Circuit, the question of whether this was a denial of equal protection to the residents of Puerto Rico to deny them social security benefits.

The District Court answered in the affirmative and said it was not a denial of equal protection.

I don't think Congress has to give food stamps to everyone. I think they can be allowed to give them to whom they want.

THE COURT: On some rational basis?

[7] MR. BRICKFIELD: Yes.

THE COURT: There is no monetary consideration here, but I was thinking of my own situation. Fortunately I am not an applicant for food stamp benefit, but I have living with me in my home a young man, unemployed, working on an intern project.

Do you mean I would not be entitled to benefits if I required them?

MR. BRICKFIELD: If you met the other eligibility requirements, yes, Your Honor.

THE COURT: Why? For what reason?

MR. BRICKFIELD: Because Congress has deemed—you would be if the young man was not with you. If the young man established his own residence and became his own household, you would be eligible, but Congress has determined that people without a certain degree of relationships are not those that they chose to give these benefits to.

THE COURT: Let's get back to the four requirements. Where is the irreparable injury to the government if the temproary restraining order is granted?

MR. BRICKFIELD: We feel that the only relief that the Court can give, vis-a-vis the statute, is to strike down the Food Stamp Act as amended.

Accordingly, no one at that juncture will get food [8] stamps. Congress has not authorized expenditures or appropriated money to give food stamps to these Plaintiffs.

Taking the question of the regulation as most favorable to Plaintiffs, as Mr. Pollack has stated, there are in each household at least one person that the statute clearly has not made eligible.

THE COURT: Now, the Hejny family was receiving benefits up until March, were they not?

MR. BRICKFIELD: I have no information. I do not contest that at this point, but I have no information concerning that.

The food stamp program is administered by the local agencies and the Department of Agriculture does not directly deal with the people, but assuming they were, Your Honor, if—this Court cannot order benefits of the young lady Sharon who is living with the Hejny family because Congress has not appropriated the money.

What the Court can do is say no one gets food stamps until Congress changes their mind or passes a constitutional law if the Court feels that law is unconstitutional.

We do feel that the status quo also, Your Honor, is the situation with the Act and the regulations in effect, and this must be maintained.

[9] That pertains to these individual Plaintiffs because the status quo is that they are not getting food stamps in the class action, if this becomes a class action, for people that Plaintiffs represent who are mostly people who are not getting food stamps.

Accordingly, Your Honor, the status quo to be preserved is one with the regulations as they are currently in effect.

This Act has been passed for over a year.

THE COURT: It has been implemented only in recent months, has it not?

MR. BRICKFIELD: Yes, it has, Your Honor.

THE COURT: In other words, if counsel is correct, it was just last month that the Hejny family was denied benefits?

MR. BRICKFIELD: Yes, sir, but they are also not receiving benefits and if we maintain the status quo, we would maintain them without benefits, Your Honor, and in this Circuit, the Supreme Court said that is the only reason for a temporary restraining order.

In the St. Louis and Western Railroad, the Supreme Court held in a case very similar to this where a statute was attacked, a District Court judge granted a temporary restraining order which did not preserve the status quo and the Supreme Court stated that was the only grounds that the temporary [10] restraining order could be granted pending the convening of a three judge court.

THE COURT: Very well.

MR. BRICKFIELD: If I may make one additional comment, Your Honor?

THE COURT: Yes.

MR. BRICKFIELD: We further feel that the statute and regulations are not in conflict.

Household is defined in several ways in the statute. It is defined as people who are related and is further defined as a particular individual.

Taking the case of any of the Plaintiffs and perhaps the Hejny's, the question would be, who is the household? Is it the Hejny's or Sharon? She could become a household in and of herself and would she not qualify as a household and should the Hejny's be disqualified?

In the case of Mr. Durant, you have the gentleman living with another male friend and they are receiving,

and I believe one is going to college, and taking Plaintiffs construction it is impossible to determine which one of these two people constitutes the household.

The household constitutes a group of related people. There is on one group of related people in any of these households [11] which share the common cooking facilities, prepared their food in common, purchase their food in common.

There is one group that fits that definition of a household, being all related people and in the Hejny situation, they are not all related people who are preparing and obtaining their food in common and so there is no household and it is this group of people we feel that constitutes the ineligible people within the intent of Congress and referring to the letter by the six Senators, I really do think it is irrelevant.

I do not think there is any decision that holds that a subsequent pronouncement of a Congressman or two or a Senator or two can affect as amendment in legislation. The legislation is what is there and not what a Congressman or a Senator or Senators thinks was at a later date.

The consideration of the legislative history, we contend, are the contemporary—the previous considerations, what was on the mind of the Congress when they passed a particular statute and not at a later date.

If this was the contention of the Senators they could have, of course, taking the floor and the floor was open and admittedly, the Senate passed it, I believe, on the 31st of December and it was late in the evening, but they still could have made their particular thoughts known.

[12] Lastly, we feel that this would grant Plaintiffs the ultimate relief they seek preliminarily.

Conceded, arguendo, the Plaintiffs are a needy people but to give benefits to the people that Plaintiffs counsel lists as being in the thousands would certainly be at great cost.

As this Circuit said in the Delaware and Hudson Railroad case just last year, the question in preserving the status quo and in balancing the equities is that you must consider the question of a valid bond.

There they were involved with a $1,000.00 bond concerning a railroad strike and they held that was impossible to adequately compensate the parties.

Here we are—the Plaintiffs are needy. They have no monetary means to provide a bond. To give them the food stamp now would be granting them ultimate relief preliminarily which we do not feel should be given at a hearing on a temporary restraining order.

The Congress in passing the three judge court statute fully contemplated that any decision on preliminary relief would be taken at a full hearing by three judges. They have shown that great reluctance should be given when this extraordinary relief is prayed for.

We feel certainly in a case where Plaintiffs are [13] getting the ultimate relief preliminarily, the Court should exercise restraint.

Thank you, Your Honor.

THE COURT: Very well.

This record is certified by the undersigned to be the official transcript of the above-entitled proceedings.

/s/ Dawn T. Copeland

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JACINTA MORENO, et al.,	:	
Plaintiffs,	:	Civil Action
v.	:	No. 615-72
	:	
DEPARTMENT OF AGRICULTURE, et al.,	:	
Defendants.	:	

Washington, D.C., April 14, 1972

BEFORE THE HONORABLE CARL McGOWAN, Circuit Judge, THE HONORABLES JOHN LEWIS SMITH, Jr., and AUBREY E. ROBINSON, Jr., United States District Court Judges.

APPEARANCES:

RONALD F. POLLACK, Esq., JOHN R. KRAMER, Esq., and ROGER A. SCHWARTZ, Esq., for the Plaintiffs.

PETER BRICKFIELD, Esq., JOHN HARRIS, Esq., and ROBERT LOWREY, Esq., for the Defendants.

PROCEEDINGS

JUDGE McGOWAN: You may proceed.

MR. BRICKFIELD: May it please the Court, initially–

JUDGE McGOWAN: Before we forget it, are you prepared to have the case decided on the merits now or do you want to preserve that question?

MR. BRICKFIELD: Your Honor, it is our contention that if this Court does not find a rational basis for the statute and yet it determines it does have jurisdiction, an

evidentiary hearing must be presented to determine if in fact there is a rational basis.

JUDGE McGOWAN: In other words, you are not–

MR. BRICKFIELD: We are not seeking the final determination here.

With a slightly red face, we would like to call the Court's attention to a typographical omission in the papers which were submitted at page 16.

We cite the case of Faraco versus Commissioner of Internal Revenue and through a typographical error, the citation of certiorari–

JUDGE McGOWAN: Let me interrupt you a minute.

You have made a motion for summary judgment in which you say there are no material issues of fact.

[16] MR. BRICKFIELD: Yes, but if the Court deems there are material issues of fact and we say there are no material issues of fact in that there is a rational basis for the statutory enactment and that the Act is constitutional, assuming jurisdiction, but if the Court determines within the legislative history of the Act, and we feel this is governed by the Chicago Mercantile Exchange versus Tieken case which we cite at page three of our brief, the Court in considering the constitutionality of the statute should consider the legislative history before the Congress and if the legislative history before the Congress shows a rational–shows and provides a rational basis and provides that the statute was constitutional, of course the Court should uphold this statute.

There is a strong presumption of constitutionality and if the Court determines that the legislative history is inadequate, does not provide that basis by which the Court can sustain the statute, we feel the Court would then look to the rationale of Flemming versus Nestor to see if there is any basis for sustaining of the constitutionality of the statute.

In Flemming, the Supreme Court stated that the Court should look far and wide for a basis for sustaining a statute before striking down a statute.

If I can just go back to the point that I started to [17] make, I feel constrained to make this and the case we did cite at page 16, typographically we omitted the citation of certiorari being denied at 359 U.S. at–

JUDGE McGOWAN: Which case is that? What is it referring to?

MR. BRICKFIELD: This would be our motion in support of our–in our memorandum of Points and Authorities for the motion to dismiss. It is about 8 or 9 pages from the back.

It is 359 U.S. 925.

JUDGE McGOWAN: Three what?

MR. BRICKFORD: 359 U.S. 925.

This Court has expressed a concern with a statutory–the basis of its jurisdiction. On the original question that Judge McGowan presented, we feel that this Court can at most consider the statutory–the constitutionality of the statute.

If this Court upholds the constitutionality of the statute, the case should be remanded to a single judge court for a determination of the applicability of the regulations and for that reason, in our memoranum of Points and Authorities, we did not address ourselves specifically to the regulations.

If this Court determines that the statute is unconstitutional, it is our contention that the only relief [18] that can be afforded is a striking down of the Food Stamp Act of 1964 as amended.

Congress has categorically provided relief to individuals, related individuals, who reside in households.

Congress has included only related individuals and those to whom it is granting relief, the judiciary cannot extend to a further group of people a congressional benefit.

The Congress only can expend the public funds. When Congress appropriated the money for the food stamp program, it has appropriated it only to those it specifically intended to benefit.

JUDGE McGOWAN: In other words, your claim is that if we find Section 3-A unconstitutional, the whole statute goes?

MR. BRICKFIELD: Yes, Your Honor.

This we feel is a substantial reason why a preliminary injunction should not issue because it certainly would not be in the public interest.

JUDGE McGOWAN: I would like you to go over that argument again.

MR. BRICKFIELD: In passing the Food Stamp Act, and the supporting appropriations, Congress authorized stamps to be distributed to households.

[19] The Food Stamp Act has operated on a household basis. If Congress—Congress defines household as being a group of related individuals and other definitions, but the one we are concerned with here is the related individuals and if in defining and providing relief only to related individuals, Congress has acted in an unconstitutional fashion, this Court can only strike down Congress' enactment and if, for example, Congress were to make a particular act a crime, a criminal violation, and that was determined by a court to be an unconstitutional determination, the Court could not then in and of itself say another thing will be a crime, something very similar.

When Congress has only said related people can get food stamps, the judicial section of the government cannot say, we want to give food stamps or we think stamps should be given to more than those that Congress has determined should be eligible.

Congress has expressed an intent not to give food stamps to certain groups. If they are wrong, no one should get them until Congress comes forward again and gives them to the proper groups.

We would like to incorporate our original memorandum in opposition to Plaintiffs' request for a temporary restraining order into our argument.

Would the Court want me to go into the jurisdiction [20] of the District Court?

JUDGE McGOWAN: I was looking at your second paper that was filed. I saw it for the first time this morning.

Your argument there seems much more limited than before.

Do you agree that 1361 gives the Court jurisdiction?

MR. BRICKFIELD: No, we don't, your Honor. We limited our second jurisdictional argument mainly to the points that are presented at the hearing on the temporary restraining order.

JUDGE McGOWAN: How do you handle the Peoples case?

MR. BRICKFIELD: Well, I would first initially give the distinction that the Peoples case concerned—was decided on, from the basis of the opinion, the prior statute which no longer governs the District Court.

It would seem to me that the gravamen of the Peoples case was an attack on the Secretary's regulation as being violative of the statutory provisions.

We do not feel that 1361 grants a court jurisdiction to consider the constitutionality of a statute.

With regard to Plaintiffs argument on the $10,000 jurisdictional amount, we would respectfully refer to the case of Rosado versus Wyman and wherein the court quoted from another case and stated, "it is firmly settled law that cases [21] involving rights not capable of valuation in money may not be heard in Federal Courts where the applicable jurisdictional statute requires that the matter at controversy exceed a certain number of dollars."

Plaintiffs' have stated that they do not contend that they received or will receive the $10,000 worth of food stamps or are owned $10,000 worth of food stamps. The key jurisdictional amount argument, the amount of injury or harm, the courts have uniformly stated that Congress has been aware of the incalculability of these rights and Congress being aware of this, chose not to change the statute, must be deemed to have approved that judicial interpretation.

With respect to the Markees case, which was in California, we would note–

JUDGE McGOWAN: Does that appear in the Federal Supplement?

MR. BRICKFIELD: No, it does not.

JUDGE McGOWAN: Is that a District Court case?

MR. BRICKFIELD: Yes, it is, Your Honor. I do not have the citation of that.

JUDGE McGOWAN: I think somebody should provide us with that.

MR. BRICKFIELD: We will provide it, Your Honor.

[22] I would like to note though that that case concerned an attack on the statutory provisions, and the regulations–the acts that were taken were not in accordance with the statutory provisions and not a constitutional attack, and second that the Department of Agriculture was dismissed from that case and the argu-

ment against them was moot, and an opportunity to appeal that matter was not presented to the Department of Agriculture for what we would determine appropriate determination of the court's jurisdiction.

Plaintiffs' have moved for a preliminary injunction. The four grounds for the granting of a preliminary injunction are well known; the substantial likelihood of success on the merits, irreparable injury, maintenance of the status quo and consideration of the public interest.

On the question of success on the merits, the Supreme Court in Flemming versus Nestor said, "that it is not on the slight implication and vague conjecture that the legislature is to be pronounced as having transcended its powers and its acts considered as void."

The statute that we are concerned with here must be held constitutional if there is any set of facts which can sustain its constitutionality.

Plaintiffs' have alleged it is violative on the equal [23] protection provisions and we would refer the Court to the case of Dandridge versus Williams in which the State of Maryland requirements of a maximum amount of aid to families with dependent children was considered.

There the Supreme Court stated, "that in the area of economic and social welfare, a state does not violate the equal protection clause merely because of classifications made by its laws were imperfect. If the classification has some reasonable basis, it does not offend the constitution merely because the classification is not made with mathematical nicety or results in some inequality."

We contend that those provisions of due process that is required of the states are applicable here.

The test is the test in Dandridge. The rights of the Plaintiffs they allege are being violated, are the rights to privacy, the right to association.

They have never been held to be contained in the Bill of Rights and in the Griswold case, that the Plaintiffs cite, the Supreme Court states specifically that neither right appears in the Bill of Rights.

They evolve from the right to be secure in ones home and the right not to have an invasion of an illegal search and seizure under the 7th Amendment.

These rights have been primarily defended in the case [24] of physical violations and intrusions into a home and criminal matters.

The Mapp versus Ohio case was a physical violation.

The case in Virginia where a gentleman complained that somebody was soliciting is a physical violation—intrusion.

The Griswold case concerned contraceptive information to married couples.

The Eisenstadt case, concerning contraceptive information to single people, concerned criminal violations.

Plaintiffs' herein are not charged with any criminal violations.

These rights are at most within the penumbra of the Constitution.

The Congress in 1964 extended food stamps to households. The Plaintiffs in quoting from the purpose of the Act, refer repeatedly to the household orientation. Congress did not attempt to provide food stamps for all people, but just for households.

They did not attempt to totally alleviate malnutrition. They attempted to alleviate malnutrition and more adequately supply our nation's food abundance to households.

Several years went by and Congress took a new look at the food stamp program at which time they retreated to the traditional view of a household.

In safeguarding the health and providing nutrition, they wanted to give this on a household basis. When Congress extends benefits to a group of related individuals, the question the Court must decide is that extension of benefits to these related individuals, is it so irrational, is it unconstitutional and we contend not.

As early in 1884, the Supreme Court has stated and I quote, "persons who dwell together as a family constitute a household."

The Eighth Circuit in 1968 used the very phrase, household and family interchangeably in considering whether an 18 year old college student who was home on vacation was a member of his mother's household. He was between semesters.

In Fidelity and Casuality Company of New York versus Jackson, the Court stated, "the term household is customarily used to mean a number of persons who dwell together as a family."

In Plaintiffs argument–

JUDGE ROBINSON: It doesn't say anything about being related, does it? How are you going to define family?

MR. BRICKFIELD: Yes, this is true, Your Honor. We contend that the traditional concepts of a family are related people.

[26] JUDGE ROBINSON: Yes, but we are not dealing with tradition. We are dealing with legal concepts.

MR. BRICKFIELD: Congress–the term household is not unknown to Congress.

Congress has used it before and in the Internal Revenue Code–

JUDGE McGOWAN: I think what you are saying raises this question to me: Is there anything in the Act or legislative history that would indicate that Congress was

concerned with the morality of the people who were to get food stamps?

MR. BRICKFIELD: Nothing in the legislation concerning this—concerning the morality of the persons for whom food stamps were to be—

JUDGE McGOWAN: The purpose of the Act was to promote the movement of surplus products off farms and also to increase nutrition of poor people. Is that fair to say?

MR. BRICKFIELD: No, Your Honor, we contend it is to increase nutrition in households. We do think that—

JUDGE ROBINSON: You are going to define households according to what standards, the standard of morality or the standard of law and where is the legal standard?

MR. BRICKFIELD: The legal standard we contend would be the same standard as contained in the Internal Revenue Code. They have used that phrase in the Internal Revenue Code and they have also defined families, Your Honor, in the aid to [27] families with dependent children provisions.

The Supreme Court in Dandridge referred very frequently—

JUDGE McGOWAN: I could be a household within the meaning of the statute living alone, right?

MR. BRICKFIELD: Yes, an individual is defined as a household. When an individual decides to associate with others then—

JUDGE ROBINSON: As a family?

MR. BRICKFIELD: As a family, then he becomes eligible but only in a related sense for food stamps.

In the aid to families with dependent children, a child who is living with a person—

JUDGE McGOWAN: Congress was not movitated by that purpose for the first several years of the Act, right? The statute specifically read that it did not make any difference whether they were related or not related.

MR. BRICKFIELD: Yes.

JUDGE McGOWAN: In changing that concept, did Congress indicate its purpose was one of morality?

MR. BRICKFIELD: Congress—the only congressional contention that we see is the congressional intention that the hippy communes would not be included. What morality we can read [28] into that, I am not sure.

The exact intention of Congress, Your Honor, is not the only criteria which we can regard.

If there is any criteria by which Congress could have passed this provision, and if Congress put into the legislative history that we are doing this to maintain family units, then this Court must consider that as a rational basis.

JUDGE McGOWAN: But they didn't.

MR. BRICKFIELD: That is not relevant, Your Honor.

Why Congress passed an Act may help in assessing its constitutionality, but the Supreme Court held that if there is any rational basis that Congress could have used to pass an Act, the Act should be sustained.

JUDGE McGOWAN: The Supreme Court also has held that when you start making classifications, they must be related to some relevant purpose by the statute.

MR. BRICKFIELD: Yes.

JUDGE McGOWAN: So to the extent that you are talking about the equal protection argument, the purpose of passing an enactment is highly relevant. Is that correct?

MR. BRICKFIELD: Well, I think, Your Honor, in looking at the legislative history here that they intended to exclude communal groups and I think it allows an

implication that [29] related people only receive these benefits, a family, and I think a family–

JUDGE McGOWAN: Suppose a man and a woman live quiet and they are not married and are poor. Are they excluded?

MR. BRICKFIELD: They are excluded.

JUDGE McGOWAN: Why, because they are really hippies or because–

MR. BRICKFIELD: No. Your Honor, because they are not related.

The relation Congress has given in the granting of–the availability of a joint tax return to married people and if one were to live with an unmarried person, one cannot file a joint tax return. This has been upheld, the constitutionality of the marriage requirements in the Internal Revenue Code.

This is a rational distinction that these people also cannot file a joint tax return and they are also not eligible for food stamps.

If a young child comes in and as the Hejny's here, a young waif off the street, they would not be eligible for aid to families with dependent children. This is all part of a greater plan, I think, in which we are trying to contain ourselves into this traditional family unit and I do believe that is the rational reason for this.

[30] Certainly when Congress attempts to alleviate hunger, we cannot say they cannot attempt to help another problem also.

The original purpose of this Act was agricultural. Section 16-D of the Act provides though that the budgetary considerations should be considered under the welfare provisions, but in attempting to get rid of the agricultural surpluses, they were going to do some good and provide them to certain persons.

JUDGE McGOWAN: Now, the morality of the person who eats has no relation to the agricultural circumstance. The more the merrier, right?

Nutrition also does not depend upon morality, I take it?

MR. BRICKFIELD: That is true, Your Honor.

JUDGE McGOWAN: It seems to me that if you are going to argue morality, with respect to the equal protection argument, you are going to have to establish that this is one of the purposes of Congress.

MR. BRICKFIELD: Your Honor, we contend that we do not have to argue that.

That if Congress has specifically said its purpose–if that is enough to sustain that–

JUDGE McGOWAN: That would be highly relevant, would it not?

[31] MR. BRICKFIELD: Assume arguendo it would be enough and if it is enough, then we contend that this Court must sustain that statute.

JUDGE ROBINSON: But you want us to arrive at it by implication. You want us to find that this was an underlying cause.

MR. BRICKFIELD: No, Your Honor. We want you to find that there was some rational basis, rational set of facts somewhere that Congress could have passed this Act on, and if you can find that, then this statute must be upheld. That is what we contend Flemming versus Nestor is.

JUDGE McGOWAN: Why don't you finish what you have to say, Mr. Brickfield.

MR. BRICKFIELD: We feel that the provisions and definition of household in the Internal Revenue Code shows congressional knowledge of that term and that Congress used this specifically with that in mind.

JUDGE McGOWAN: What is that definition again?

MR. BRICKFIELD: They used related persons and they do list the degree of continunity, mother, father, brother, sister and aunts and uncles.

In the Dandridge case, the Supreme Court stated specifically that Congress has intended to use the ADC to assist families, and it was to help dependent children, and a child is [32] dependent who has no resources and Congress limited it to those who were living with relatives and the Supreme Court upheld that and Mr. Justice Douglas in his dissent, and I don't think he could be termed as the most conservative member of the Court, stated that the purpose of aiding the family was valid.

Congress has a valid purpose in maintaining the family unit although the purpose of the statute was to aid a child.

This we feel is a compelling reason and in summary, we contend that if there is any rational set of facts that would allow this Court to uphold that statute, this Court is so obligated.

Thank you.

JUDGE McGOWAN: Thank you, Mr. Brickfield.

This record is certified by the undersigned to be the official transcript of the above-entitled proceedings.

/s/ Dawn T. Copeland
Official Court Reporter

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Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-534

UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL., APPELLANTS

v.

JACINTA MORENO, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR THE APPELLANTS

1. In their brief in this Court, appellees repeatedly refer to an "unrelated household provision" in the Food Stamp Act,[1] a provision they deem unconstitutional. But the Act contains no such provision. Instead, Section 3(e) of the Act[2]—the statute at issue in this case—provides in relevant part that "household" means "a group of related individuals * * *"; since eligibility for food stamps is determined on a household basis, only such households are entitled to participate in the program.

Of course, everyone not included under the Act's definition of eligibility is excluded and unrelated

[1] *E.g.*, Appellees' Brief, at pp. 1, 2, 10, 11, 12, 14, 15, 16, 21, 24, 26, 27, 30, 32, 36, 37, 38, 43, 60, 61, 63.

[2] 7 U.S.C. 2012(e).

households therefore do not qualify. But our point is that this Court should obviously consider the specific statute involved in this case, which makes related households eligible for food stamps, rather than appellees' non-existent "unrelated household provision." This is no mere technical quibble. For what must be determined here is whether the Constitution permitted Congress to provide food stamps only to related households, or, more precisely, whether under the Due Process Clause of the Fifth Amendment Congress could constitutionally choose to go only this far and no farther.[3]

As in *Katzenbach* v. *Morgan*, 384 U.S. 641, 656–657 (discussed in *San Antonio School District* v. *Rodriguez*, No. 71–1332, decided March 21, 1973, slip op. at p. 34), the complaint here is "that Congress violated the Constitution by not extending the relief effected [to others similarly situated] * * *." The resolution of this complaint does not turn on whether the objectives of the Act might have been furthered if Congress had included unrelated households.[4] The controlling issue is whether in providing food stamps to related households

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[3] As we explained in our main brief, at p. 14, it is of no constitutional significance that in the original Act Congress defined households to include both related and unrelated persons living together. There is no difference between Congress' taking only one step forward or, instead, taking two steps forward and one backward. The result is the same in either case and in both situations the question under the Fifth Amendment is whether Congress had a rational basis for stopping where it did in defining the standards for a household's eligibility for food stamps.

[4] For example, in *Dandridge* v. *Williams*, 397 U.S. 471, the State computed a family's benefits under the AFDC program

Congress served the Act's purposes and had a rational basis for stopping there.

There is no dispute that participation by related households in the food stamp program serves the Act's purposes of raising the level of nutrition among low-income households and strengthening the agricultural economy. 7 U.S.C. 2011. The issue here is a different one: whether Congress had a rational basis for including only related households in the program. Appellees argue that Congress' decision to do this was a bolt from the blue, hastily conceived in the Conference Committee during the closing days of the Session, without careful consideration (Appellees' Brief, at pp. 22, 23, 41). Even if this were so, it would not be relevant.

But in any event food stamp eligibility of voluntarily unemployed persons, such as groups of unrelated college students and groups of unrelated people that chose to

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on the basis of the number of children in the family, but imposed a ceiling on the amount of the grant regardless of the family's size. Even though allowing additional benefits for more children, without having any maximum grants, would surely have served the purposes of the program to aid needy families with dependent children, this Court nevertheless upheld the State's maximum grant provision under the Equal Protection Clause of the Fourteenth Amendment because the provision had a rational basis. (The maximum grant provision furthered the State's interest in encouraging employment and maintaining an equitable balance between welfare families and the working poor.) 397 U.S. at 486–487.

Thus, appellees' argument that participation in the food stamp program by unrelated households would also further the Act's purposes (Appellees' Brief, at pp. 12–17) does not lead to the conclusion that Congress' failure to include such households violated the Fifth Amendment.

adopt a communal life-style, had been a matter of congressional concern from the outset, as the hearings on the food stamp program reveal. See, *e.g.*, Hearings before the House Committee on Agriculture on the General Farm Program and Food Stamp Program, 91st Cong., 1st Sess., pp. 17–18, 797, 861, 879–880, 901–902. Indeed, Congress had been presented with evidence that in the first county in California to adopt the food stamp program, as well as in other counties in the State and elsewhere, a large percentage of those participating by 1969 were in the category of voluntarily poor: 38.6 percent of the "nonassistance" [5] households receiving food stamps in the county were groups of college students and 42.4 percent were groups of persons who had joined together to adopt a communal life-style. *Id.* at 901–902. These concerns were echoed during the floor debates both before [6] and after [7] the Conference Committee reported the bill containing the present Section 3(e) making only related households eligible for food stamps.

As we have argued in our main brief, at pp. 14–18, in setting standards for food stamp eligibility, Con-

[5] "Nonassistance" households are those households that are not receiving public assistance under welfare programs. Cf. 7 U.S.C. 2019(c). See also Appellees' Brief, at p. 4 n. 1.

[6] 116 Cong. Rec. 42003 (Rep. Foley); 42021 (Rep. Belcher) (1970). Representative Foley, joined by Representative Quie, proposed a substitute bill, which contained a provision "exclu[ding] from the concept of a household any group of six or more individuals no more than two of whom are related to one another by blood, marriage, or adoption." *Id.* at 42003. The Foley-Quie substitute was defeated by a close vote (183–172). *Id.* at 42032.

[7] *Id.* at 44431 (Sen. Ellender); 44439 (Sen. Holland).

gress could rationally conclude that if it went beyond related households to encompass unrelated households as well, this might qualify groups of unrelated individuals such as those mentioned above and that the program should therefore not extend that far. In any public assistance program, priorities must be set in order to allocate "limited public welfare funds among the myriad of potential recipients." *Dandridge* v. *Williams, supra,* 397 U.S. at 487, citing *Steward Machine Co.* v. *Davis,* 301 U.S. 548, 584–585; and *Helvering* v. *Davis,* 301 U.S. 619, 644. In determining priorities, Congress legitimately and rationally decided to limit the program to related households in light of the greater potential for abuse by groups of unrelated persons who choose to remain voluntarily poor, who might be receiving undisclosed assistance from relatives living elsewhere, or who have living arrangements that are more fluid and temporary, thereby giving rise to administrative difficulties in continually certifying household eligibility on the basis of size, income and other factors.[8] In so deciding, Congress did not focus on "hippy" communes because these were politically unpopular groups, as appellees assert,[9] but rather because these were in large part groups of persons who were voluntarily poor and therefore less deserving of food stamps on a scale of priorities which Congress could rationally follow.

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[8] See our main brief, at pp. 15–17.

[9] Appellees' Brief, at pp. 17, 20–21, 60.

It is no answer to say, as appellees do,[10] that there were other methods available for preventing abuses by unrelated households, such as criminal sanctions, 7 U.S.C. 2023(b) and (c), and work requirements, 7 U.S.C. 2014(c), and that Congress therefore acted irrationally when it made only related households eligible for food stamps. Congress knew that such abuses would be difficult to detect, that "there is a definite problem with respect to eligibility—the extent to which it is checked, and to see that the entitlement of people to the stamps is properly supervised and watched,"[11] and that "there is a real problem of administrative control."[12] And this knowledge additionally served as a rational basis for Congress' including in the food stamp program only related households where these problems would not be as acute.

"Of course, every reform that benefits some more than others may be criticized for what it fails to accomplish." *San Antonio School District* v. *Rodriguez, supra,* at p. 35. And appellees correctly point out that by extending food stamp eligibility only to related households, Congress may not have alleviated the plight of persons such as appellee Moreno and others, who appear in need of the assistance food

[10] Appellees' Brief, at pp. 28–32, 62–63.

[11] House Hearings, *supra*, at 695 (testimony of Rep. Michel).

[12] *Ibid.* See also 116 Cong. Rec. 41982–41983; 41993 (Rep. May: "Inadequate or loose certification procedures are a major source of program abuses, and it is these abuses which generate public antipathy toward the program."); 42026 (Rep. Conte: "[T]he only means for dealing with fraud is through criminal prosecution—a method that has not worked in the past.").

stamps could provide.[13] But to uphold the constitutionality of Section 3(e) this Court is not required to find that it "is wise, that it best fulfills the relevant social and economic objectives that [Congress] might ideally espouse, or that a more just and humane system could not be devised." *Dandridge* v. *Williams, supra,* 397 U.S. at 487; see also *Jefferson* v. *Hackney,* 406 U.S. 535, 546; *Lochner* v. *New York,* 198 U.S. 45, 75 (Mr. Justice Holmes, dissenting)[14]. The question instead is whether Congress had a rational basis for legislating as it did and, as we have argued above and in our main brief, we believe Section 3(e) should be sustained under that standard of judicial review because Congress did not act irrationally in limiting eligibility to related households.

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[13] Appellees' Brief, at pp. 36–38. But cf. p. 10, *infra.*

[14] While framed in terms of Equal Protection, the Fifth Amendment challenge to Section 3(e) of the Food Stamp Act is quite similar to the type of substantive Due Process challenge in *Lochner* to the maximum 60-hour workweek for bakers, see *Dandridge* v. *Williams, supra,* 397 U.S. at 484; *Richardson* v. *Belcher,* 404 U.S. 78, 81; *Jefferson* v. *Hackney, supra,* 406 U.S. at 546–547. (The Equal Protection argument in *Lochner* would simply have been that the 60-hour maximum workweek unlawfully discriminates against bakers who would not suffer any impairment in their health by working more than 60 hours and desired to work longer because they needed the extra income.) There appears to be no relevant difference between determining whether Congress has acted arbitrarily in violation of the Due Process Clause, cf. *Ferguson* v. *Skrupa,* 372 U.S. 726, or legislated without a rational basis in violation of the Equal Protection Clause of the Fourteenth Amendment as incorporated in the Due Process Clause of the Fifth Amendment. (See Mr. Justice Stewart concurring in *San Antonio School District* v. *Rodriguez,* No. 71–1332, decided March 21, 1973, slip op. at p. 2: "it has long been settled that the Equal Protection Clause is offended only by laws that are invidiously discriminatory—only by classifications that are wholly arbitrary or capricious.")

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2. Appellees also assert that the class discriminated against by Section 3(e) is composed of persons "in need of food stamp relief, but who live in households that include one or more persons who are unrelated to everyone else in the household" (Appellees' Brief, at p. 12). This is not, however, an accurate description of the class of persons who fail to qualify for food stamps under Section 3(e).

First, if a person 60 years of age or older moves into or is a member of a related household that is otherwise eligible for food stamps, the household remains eligible even if that person is unrelated to any of the household's other members. 7 U.S.C. 2012(e); 7 C.F.R. 270.2(jj)(2). Also, a household is not ineligible if it is comprised of two unrelated people living together, one of whom is 60 years of age or older. 7 C.F.R. 270.2(jj)[15].

Second, if the person or persons moving into a related household are under 18 years of age, the household will continue to be considered as an eligible household under Section 3(e) regardless of the fact that the children are unrelated or not legally adopted so long as one of the adult members of the household "acts in loco parentis to such children," that is, performs the duties of a parent.[16]

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[15] Similarly, if a household is composed of a number of persons, only one of whom is under 60 years of age, it is not ineligible, even if none of the persons is related. *Ibid.*

[16] 7 C.F.R. 270.2(rr), 270.2(kk). Thus, if Sharon Sharp, who moved in with appellee Hejny, had been under 18 years of age (she is now 21), this may not have rendered the Hejny's ineligible for food stamps. See App. 28–31.

Also, if a man and woman are living together they shall be considered related for the purposes of Section 3(e) even if they are not legally married so long as they are considered as husband and wife "by the community in which they live." [17]

Moreover, even if a group of unrelated persons living together does not come within any of the specific examples above, it does not follow that such persons are ineligible for food stamps as an unrelated household. In the recent case of *Knowles* v. *Butz*, No. C-72-1578, decided February 23, 1973 (N.D. Calif.),[18] the court held that even if persons share living quarters and the expenses thereof, they are not necessarily one "household" under Section 3(e) since such persons may not comprise a single "economic unit" [19] as Section 3(e) requires. Thus, to take the most simple example, if two unrelated persons, who are receiving food stamps while living apart, decide to live together in the same house or apartment and to share housing expenses in order to economize, they could remain eligible for food stamps as separate households (rather

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[17] 7 C.F.R. 270.2(rr).

[18] This opinion of the district court is included as an Appendix to this Reply Brief.

[19] Section 3(e), 7 U.S.C. 2012(e), provides in pertinent part: "The term 'household' shall mean a group of related individuals * * * who * * * are living as one economic unit * * *." In its instructions to the State agencies administering the Food Stamp Program, the Department of Agriculture's Food and Nutrition Service (FNS) defines "economic unit" as meaning that "the common living expenses are shared from the income and resources of all members and that the basic needs of all members are provided for without regard to their ability or willingness to contribute." [FNS Instruction 732-1, § III(D)(1)(d).]

than as one unrelated household) so long as they do not otherwise pool their resources.[20] See *Knowles* v. *Butz, supra* (App., *infra,* at p. 18).

The Department of Agriculture has accepted the ruling in *Knowles.*[21] It is not clear how many, if any, of the households represented by the individual appellees in this case would now qualify for food stamps in light of the *Knowles* decision. It appears, however, that with minor adjustments all of them might be able to become eligible as separate households,[22] with the possible exception of the unrelated group composed of appellees Gaddy, Jirel, Hoffman, Small and McElyea, who allege that they "share all expenses," consider themselves as one family, live together out of affinity for one another and apparently desire to continue doing so (App. 40). The result would thus approach that suggested in a Resolution sponsored by a number of Senators,[23] and discussed in appellees' brief, at

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[20] Thus, as an analogy, two lawyers sharing an office suite and expenses, are not thereby made partners.

[21] *Knowles* was a class action and the court issued a permanent injunction preventing the Secretary "from refusing to provide Food Stamps to any person for the reason that all persons with whom they share living quarters and share the expenses for such quarters must be considered a single 'household' for purposes of the Food Stamp Program" (App., *infra,* p. 20). The government will not appeal regarding the decision as applicable only to sharing expenses for housing.

[22] The unrelated individual might comprise one household and the related individuals comprise another, while both continued living in the same house and sharing the expenses therefor.

[23] 117 Cong. Rec. 14025–14028 (1971) (the Resolution was sponsored by Senators McGovern, Cranston, Kennedy, Hart, Mondale,

pp. 19–20 n. 9; the Resolution, while expressing no disagreement with Section 3(e) insofar as it denies "food stamp eligibility to unrelated individuals only," proposed that some of its impact be lessened by regulations expanding the definition of "related" or by treating related members of an unrelated group as a separate household. 117 Cong. Rec. 14027 (1971).

3. We also note that even aside from Section 3(e), the joining together of two eligible households may render the resulting, consolidated household ineligible for food stamps. Take, for example, two persons living apart, both receiving food stamps and both earning $170 per month; if they decide to live together and pool resources for all expenses their combined income of $340 per month would exceed the $233 maximum allowable income for a household of two people.[24] Also, if one of the adult members of

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Nelson, Hollings, Magnuson, Hartke, Ribicoff, Church, Bayh, Humphrey, Pastore, Tunney, McGee, Muskie, Eagleton, Brooke, Fulbright, Randolph, Gravel, Harris, Hughes and Williams).

[24] For 48 States and the District of Columbia, the maximum allowable monthly net food stamp income standards provide (FNS Instruction 732–1, Exhibit B):

Household Size:	*Maximum Allowable Income*
1	$178
2	233
3	307
4	373
5	440
6	507
7	573
8	640
Each additional member	+53

the consolidated household refuses to register for or accept employment, this disqualifies the entire household even if none of the members of one of the formerly separate households so refuses. 7 U.S.C. 2014(c).

Of course, persons may seek to adjust their living arrangements in light of such provisions. But as we argued in our main brief, at pp. 9–12, neither these provisions nor Section 3(e), which is at issue here, directly infringes upon any of appellees' fundamental constitutional rights so that the "compelling justification" standard of judicial review would be appropriate. See, in addition to the cases cited in our main brief, *San Antonio School District* v. *Rodriguez, No.* 71–1332, decided March 21, 1973, slip op. at pp. 29–30, 33.

Respectfully submitted.

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APRIL 1973.

APPENDIX

United States District Court for the Northern District of California

No. C–72–1578 AJZ

KAREN KNOWLES, ET AL., PLAINTIFFS

v.

EARL L. BUTZ, ET AL., DEFENDANTS

MEMORANDUM OPINION AND ORDER

Initially two food stamp applicants, the California Welfare Rights Organization (CWRO), and the President of CWRO brought this suit seeking a declaratory judgment that a federal administrative provision dealing with the Food Stamp Program, 7 U.S.C. Chapter 51, is invalid and injunctive relief prohibiting the enforcement of the provision. The challenged regulation, Food and Nutrition Service (FNS) Instruction 732–1, § III(D)(2)(b), provides that persons who share common living quarters and share the expense for such quarters shall be considered a "household" for Food Stamp Program purposes.[1] As a result, if any contenant is ineligible for food stamps,

[1] Plaintiffs argue that the same directive is also contained in 7 C.F.R. § 271.3(a). Defendants claim that § 271.3(a) only provides a rebuttable presumption that all who reside in common living quarters shall be considered a "household," and that FNS Instruction 732–1, § III(D)(2)(b) alone conclusively provides that all who share living quarters and the expense wherefor shall be considered a "household." Because the result is the same in either case, the court need not consider whether the challenged rule stems from only one or both of the regulations.

all of the contenents are made ineligible. *See* 7 C.F.R. § 271.3.

The court granted a temporary restraining order on August 31, 1972, and a preliminary injunction on November 2, 1972, prohibiting defendants from refusing to grant the two named food stamp-applicant plaintiffs such food stamps as they would be entitled to receive were it not for the challenged provision. In its order granting a preliminary injunction, the court certified the action as a proper one to be maintained as a class action pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure. At that time the court also explained that, in its opinion, plaintiffs are clearly correct concerning the merits of their claim. Thereafter the parties filed cross-motions for summary judgment without submitting any additional legal argument or affidavits. On November 16, 1972, the court denied both motions, because it was uncertain whether any person presently being denied welfare benefits joined in the motion.

Several motions are now before the court: (1) motion to intervene of two members of the present class; (2) motion to intervene of two persons whose food stamp benefits were decreased, but not terminated, as a result of the challenged regulation; (3) motion to grant summary judgment on behalf of the original class; (4) motion to enter default judgment on behalf of the original class against Secretary Butz; (5) motion to grant a preliminary injunction on behalf of persons whose benefits are reduced, but not terminated.

1. Motions Concerning Present Class Members:

Two members of the present class seek to intervene, apparently because the initial food stamp-applicant plaintiffs are no longer eligible for food stamp bene-

fits. The fact that the individual claims of the named plaintiffs are moot does not moot the class action portion of a lawsuit when, as in the present case, the controversy continues as to other members of the class. *See Quevedo* v. *Collins,* 414 F. 2d 796, 797 (5th Cir. 1969); *Crow* v. *California Dept. of Human Resources,* 325 F. Supp. 1314, 1316 (N.D. Cal. 1970), *cert. denied,* 408 U.S. 924 (1972). There is, therefore, no need for these new class members to formally intervene. Instead, the court will permit them to enter an appearance through counsel and participate as class members. This eliminates the delay that might otherwise be required before the court could enter summary judgment on behalf of the class members. *See* Fed. R. Civ. P. 56(a).

The initial class members now move that the court enter judgment by default against Secretary Butz. The clerk entered default against this defendant on January 23, 1973. Secretary Butz has since asked that the entry of default be vacated, but he still has tendered no answer to the complaint, offered any excuse for not doing so, or suggested when he might file an answer. Nor has the Secretary suggested any defense he might wish to raise in his answer. The court will, therefore, proceed to consider whether judgment by default should be entered pursuant to Rule 55(e) of the Federal Rules of Civil Procedure. Because the issue is substantially the same, the court will simultaneously consider whether summary judgment should be entered against Charles Ernst, the remaining federal defendant.

Plaintiffs attack the validity of FNS Instruction 732–1, § III(D)(2)(b) on the ground that the regulation is inconsistent with the Food Stamp Program statutory provisions. This regulation was promulgated by the Secretary of Agriculture pursuant to the ex-

press provisions of 7 U.S.C. §§ 2013 (a) and (c), which provide:

> (a) The Secretary is authorized to formulate and administer a food stamp program under which . . . eligible households * * * shall be provided with an opportunity to obtain a nutritionally adequate diet through the issuance to them of a coupon allotment which shall have a greater monetary value than the charge to be paid for such allotment by eligible households * * *
>
> (c) The Secretary shall issue such regulations, not inconsistent with this chapter, as he deems necessary or appropriate for the effective and efficient administration of the food stamp program.

This Court, as it must, shows great deference to the interpretation given a statute by an agency charged with its administration. *See Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). But in this particular case, there is little that the Secretary may properly interpret, because in § 2012(e) the statute provides a definition of the term "household." Thus, the Secretary's rule-making power is limited in this case, despite the express statutory authorization.

> The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law—for no such power can be delegated by Congress—but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity.

Manhattan Gen. Equip. Co. v. *Commissioner,* 297 U.S. 129, 134 (1936).

The statutory definition of "household," 7 U.S.C. § 2012(e), as modified by *Moreno* v. *USDA,* 345 F. Supp. 310 (D.D.C. 1972) (three-judge court), *prob. juris. noted,* 41 U.S.L.W. 3312 (S. Ct. Dec. 5, 1972), provides:

> The term household shall mean a group of * * * individuals who are not residents of an institution or boarding house, but are living as one economic unit sharing common cooking facilities and for whom food is customarily purchased in common.

Notably, the statute contains no suggestion that all persons who share living quarters and share expenses for such quarters shall *per se* be considered a "household." Defendants, however, claim that all persons who share living quarters and share expenses for such quarters constitute an "economic unit," and for that reason, they must be considered a "household."

Although the term "economic unit" is used in the statutory definition of "household," it is nowhere itself defined in the statute. The term is, however, defined by the regulations; FNS Instruction 732–1, § III(D)(1)(d) provides:

> *Economic units* means that the common living expenses are shared from the income and resources of all members and that the basic needs of all members are provided for without regard to their ability or willingness to contribute.

There can be no doubt that this is a proper regulation for the Secretary to promulgate pursuant to 7 U.S.C. §§ 2013 (a) and (d). It appears to be a full and fair attempt to interpret in a commonsense manner what

Congress probably meant by the term. Under this definition, however, not all who share living quarters and share the expenses for such quarters are an "economic unit," which is what defendants contend; rather, the sharing of living quarters and the expenses for them would be but one factual datum to be considered. Those who do not share income and other resources with their cotenants and who do not share any expenses except the expense of housing probably could not constitute an "economic unit" together with their cotenants under this definition. Certainly the definition does not support any *per se* rule that they would.

There is a second reason why defendants' argument is untenable: even if plaintiffs did constitute an "economic unit" together with their cotenants, the express terms of the statutory definition of "household" preclude the defendants from considering every group that is an "economic unit" to be *per se* a "household." Section 2012(e) provides that a "household" is a group: "[1] living as one economic unit [2] sharing common cooking facilities and [3] for whom food is customarily purchased in common." Thus, in no case can a group be a "household," even if it is an "economic unit," unless it shares cooking facilities and customarily purchases food in common.

The court, therefore, concludes that the members of the present class are entitled to the entry of a judgment by default against Secretary Butz and summary judgment against the remaining federal defendant.

2. Motions Concerning Prospective Intervenors:

Two individuals, whose benefits are not denied, but only reduced, because they and their cotenants are considered a "household" as a result of the challenged regulation, seek to intervene, represent the class of all persons similarly situated, and obtain declaratory

and injunctive relief against defendants. Because their claim is so nearly identical to the claim of the present class of plaintiffs, the motion will be granted.

The motion for a preliminary injunction will also be granted. In 7 U.S.C. § 2011 Congress explains the problem the Food Stamp Program is intended to alleviate:

> The Congress hereby finds that the limited food purchasing power of low-income households contributes to hunger and malnutrition among members of such households * * *. To alleviate such hunger and malnutrition, a food stamp program is herein authorized which will permit low-income households to purchase a nutritionally adequate diet through normal channels of trade.

Now that the legal issue of the regulation's validity has been resolved, there is no reason why, contrary to congressional intent, intervenors should be denied an adequate diet until the time that they, too, may file a motion for summary judgment.

Finally, for the reasons stated in the order granting temporary injunction, the court certifies that the action brought by these intervenors is a proper one to be maintained as a class action pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure.

In conformity with the foregoing opinion, which constitutes the court's findings of fact and conclusions of law,

IT IS HEREBY ORDERED that:

(1) Defendants and all persons acting by, through, or under them, are permanently enjoined from refusing to provide Food Stamps to any person for the reason that all persons with whom they share living quarters and share the expenses for such quarters must be considered a single "household" for purposes of the Food Stamp Program;

(2) Defendants shall forthwith issue instructions to all participating state governments that no person shall be denied Food Stamps for the reason that all persons with whom they share living quarters and share the expenses for such quarters must be considered a single "household" for purposes of the Food Stamp Program;

(3) FNS Instruction 732–1, § III(D)(2)(b), and any and all other regulations which have the effect of requiring that all persons who share living quarters and the expenses for such quarters must be considered a single "household" for purposes of the Food Stamp Program are declared to be contrary to 7 U.S.C. § 2012(e), and therefore void;

(4) Defendants and all persons acting by, through, or under them, are preliminarily enjoined from refusing to give persons the full amount of Food Stamps which they would otherwise be eligible to receive for the reason that all persons with whom they share living quarters and share the expenses for such quarters must be considered a single "household" for purposes of the Food Stamp Program;

(5) Defendants shall forthwith issue instructions to all participating state governments that pending the outcome of this lawsuit they shall not deny persons the full amount of Food Stamps they would otherwise be entitled to receive for the reason that all persons with whom they share living quarters and share the expenses for such quarters must be considered a single "household" for purposes of the Food Stamp Program.

Dated: February 23, 1973

ALFONSO J. ZIRPOLI,
United States District Judge.

U.S. GOVERNMENT PRINTING OFFICE: 1973

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

UNITED STATES DEPARTMENT OF AGRICULTURE ET AL. *v.* MORENO ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 72–534. Argued April 23, 1973—Decided June 25, 1973

Section 3 (e) of the Food Stamp Act of 1964, as amended, generally excludes from participation in the food stamp program any household containing an individual who is unrelated to any other household member. The Secretary of Agriculture issued regulations thereunder rendering ineligible for participation in the program any "household" whose members are not "all related to each other." Congress stated that the purposes of the Act were "to safeguard the health and well-being of the Nation's population and raise levels of nutrition among low-income households . . . [and] that increased utilization of food in establishing and maintaining adequate national levels of nutrition will promote the distribution . . . of our agricultural abundance and will strengthen our agricultural economy . . . ." The District Court held that the "unrelated person" provision of § 3 (e) creates an irrational classification in violation of the equal protection component of the Due Process Clause of the Fifth Amendment. *Held:* The legislative classification here involved cannot be sustained, the classification being clearly irrelevant to the stated purposes of the Act and not rationally furthering any other legitimate governmental interest. In practical operation, the Act excludes not those who are "likely to abuse the program" but, rather, only those who so desperately need aid that they cannot even afford to alter their living arrangements so as to retain their eligibility. Pp. 5–10. 345 F. Supp. 310, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which DOUGLAS, STEWART, WHITE, MARSHALL, BLACKMUN, and POWELL, JJ., joined. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 72-534

United States Department of Agriculture et al., Appellants, *v.* Jacinta Moreno et al.

On Appeal from the United States District Court for the District of Columbia.

[June 25, 1973]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

This case requires us to consider the constitutionality of § 3 (e) of the Food Stamp Act of 1964, 7 U. S. C. § 2012 (e), as amended, 84 Stat. 2048, which, with certain exceptions, excludes from participation in the food stamp program any household containing an individual who is unrelated to any other member of the household. In practical effect, § 3 (e) creates two classes of persons for food stamp purposes: one class is composed of those individuals who live in households all of whose members are related to one another, and the other class consists of those individuals who live in households containing one or more members who are unrelated to the rest. The latter class of persons is denied federal food assistance. A three-judge district court for the District of Columbia held this classification invalid as violative of the Due Process Clause of the Fifth Amendment. 345 F. Supp. 310 (1972). We noted probable jurisdiction. 409 U. S. 1036 (1972). We affirm.

I

The federal food stamp program was established in 1964 in an effort to alleviate hunger and malnutrition among the more needy segments of our society. 7 U. S. C. § 2011. Eligibility for participation in the program is determined on a household rather than an individual basis. 7 CFR § 271.3 (a). An eligible household purchases sufficient food stamps to provide that household with a nutritionally adequate diet. The household pays for the stamps at a reduced rate based upon its size and cumulative income. The food stamps are then used to purchase food at retail stores, and the Government redeems the stamps at face value, thereby paying the difference between the actual cost of the food and the amount paid by the household for the stamps. See 7 U. S. C. §§ 2013 (a), 2016, 2025 (a).

As initially enacted, § 3 (e) defined as a "household" "a group of *related or non-related* individuals, who are not residents of an institution or a boarding house, but are living as one economic unit sharing common cooking facilities and for whom food is customarily purchased in common." [1] In January 1971, however, Congress redefined the term "household" so as to include only groups of *related* individuals.[2] Pursuant to this amendment, the

[1] 78 Stat. 703 (emphasis added). The act provided further that "[t]he term 'household' shall also mean a single individual living alone who has cooking facilities and who purchases and prepares food for home consumption." *Ibid.*

[2] 84 Stat. 2048. The 1971 amendment did not affect certain groups of nonrelated individuals over 60 years of age. As amended, § 3 (e) now provides:

"The term 'household' shall mean a group of related individuals (including legally adopted children and legally assigned foster children) or non-related individuals over age 60 who are not residents of an institution or boarding house, but are living as one economic

Secretary of Agriculture promulgated regulations rendering ineligible for participation in the program any "household" whose members are not "all related to each other." [3]

Appellees in this case consist of several groups of individuals who allege that, although they satisfy the income eligibility requirements for federal food assistance, they have nevertheless been excluded from the program solely because the persons in each group are not "all related to each other." Appellee Jacinta Moreno, for example, is a 56-year-old diabetic who lives with Ermina Sanchez and the latter's three children. They share common living expenses, and Mrs. Sanchez helps to care for appellee. Appellee's monthly income, derived from public assistance, is $75; Mrs. Sanchez receives $133 per

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unit sharing common cooking facilities and for whom food is customarily purchased in common. The term 'household' shall also mean (1) a single individual living alone who has cooking facilities and who purchases and prepares food for home consumption, or (2) an elderly person who meets the requirements of section 2019 (h) of this title."

[3] 7 CFR § 270.2 (jj) provides:

"(jj) 'Household' means a group of persons, excluding roomers, boarders, and unrelated live-in attendants necessary for medical, housekeeping, or child care reasons, who are not residents of an institution or boarding house, and who are living as one economic unit sharing common cooking facilities and for whom food is customarily purchased in common: *Provided*, That:

"(1) When all persons in the group are under 60 years of age, they are all related to each other; and

"(2) When more than one of the persons in the group is under 60 years of age, and one or more other persons in the group is 60 years of age or older, each of the persons under 60 years of age is related to each other or to at least one of the persons who is 60 years of age or older. It shall also mean (i) a single individual living alone who purchases and prepares food for home consumption, or (ii) an elderly person as defined in this section, and his spouse."

month from public assistance. The household pays $135 per month for rent, gas, and electricity, of which appellee pays $50. Appellee spends $10 per month for transportation to a hospital for regular visits, and $5 per month for laundry. That leaves her $10 per month for food and other necessities. Despite her poverty, appellee has been denied federal food assistance solely because she is unrelated to the other members of her household. Moreover, although Mrs. Sanchez and her three children were permitted to purchase $108 worth of food stamps per month for $18, their participation in the program will be terminated if appellee Moreno continues to live with them.

Appellee Sheilah Hejny is married and has three children. Although the Hejnys are indigent, they took in a 20-year-old girl, who is unrelated to them, because "we felt she had emotional problems." The Hejnys receive $144 worth of food stamps each month for $14. If they allow the 20-year-old girl to continue to live with them, they will be denied food stamps by reason of § 3 (e).

Appellee Victoria Keppler has a daughter with an acute hearing deficiency. The daughter requires special instruction in a school for the deaf. The school is located in an area in which appellee could not ordinarily afford to live. Thus, in order to make the most of her limited resources, appellee agreed to share an apartment near the school with a woman who, like appellee, is on public assistance. Since appellee is not related to the woman, appellee's food stamps will be cut off if they continue to live together.

These and two other groups of appellees instituted a class action against the Department of Agriculture, its Secretary and two other departmental officials, seeking declaratory and injunctive relief against the enforcement of the 1971 amendment of § 3 (e) and its implementing

regulations. In essence, appellees contend,[4] and the District Court held, that the "unrelated person" provision of § 3 (e) creates an irrational classification in violation of the equal protection component of the Due Process Clause of the Fifth Amendment.[5] We agree.

II

Under "traditional" equal protection analysis, a legislative classification must be sustained if the classification itself is rationally related to a legitimate governmental interest. See *Jefferson* v. *Hackney*, 406 U. S. 535, 546 (1972); *Richardson* v. *Belcher*, 404 U. S. 78, 81 (1971); *Dandridge* v. *Williams*, 397 U. S. 471, 485 (1970); *McGowan* v. *Maryland*, 366 U. S. 420, 426 (1961). The purposes of the Food Stamp Act were expressly set forth in the congressional "declaration of policy":

> "It is hereby declared to be the policy of Congress . . . to safeguard the health and well-being of the Nation's population and raise levels of nutrition among low-income households. The Congress hereby finds that the limited food purchasing power of low-income households contributes to hunger and

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[4] Appellees also argued that the regulations were themselves invalid because beyond the scope of the authority conferred upon the Secretary by the statute. The District Court rejected that contention, and appellees have not pressed that argument on appeal. Moreover, appellees did not challenge the constitutionality of the statute's reliance on "households" rather than "individuals" as the basic unit of the Food Stamp Program. We therefore intimate no view on that question.

[5] "[W]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.'" *Schneider* v. *Rusk*, 377 U. S. 163, 168 (1964); see *Frontiero* v. *Richardson*, — U. S. —, — n. 5 (1973); *Shapiro* v. *Thompson*, 394 U. S. 618, 641–642 (1969); *Bolling* v. *Sharpe*, 347 U. S. 497 (1954).

> malnutrition among members of such households. The Congress further finds that increased utilization of food in establishing and maintaining adequate national levels of nutrition will promote the distribution in a beneficial manner of our agricultural abundances and will strengthen our agricultural economy, as well as result in more orderly marketing and distribution of food. To alleviate such hunger and malnutrition, a food stamp program is herein authorized which will permit low-income households to purchase a nutritionally adequate diet through normal channels of trade." 7 U. S. C. § 2011.

The challenged statutory classification (households of related persons versus households containing one or more unrelated persons) is clearly irrelevant to the stated purposes of the Act. As the District Court recognized, "[t]he relationships among persons constituting one economic unit and sharing cooking facilities have nothing to do with their abilities to stimulate the agricultural economy by purchasing farm surpluses, or with their personal nutritional requirements." 345 F. Supp., at 313.

Thus, if it is to be sustained, the challenged classification must rationally further some legitimate governmental interest other than those specifically stated in the congressional "declaration of policy." Regrettably, there is little legislative history to illuminate the purposes of the 1971 amendment of § 3 (e).* The legislative history that does exist, however, indicates that that amendment was intended to prevent so-called "hippies" and "hippie communes" from participating in the food stamp program. See H. R. Rep. No. 91–1793, 91st Cong.,

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* Indeed, the amendment first materialised, bare of committee consideration, during a conference committee's consideration of differing House and Senate bills.

2d Sess., 8 (1970); 116 Cong. Rec. 44439 (1970) (Sen. Holland). The challenged classification clearly cannot be sustained by reference to this congressional purpose. For if the constitutional conception of "equal protection of the laws" means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest. As a result, "[a] purpose to discriminate against hippies cannot, in and of itself and without reference to [some independent] considerations in the public interest, justify the 1971 amendment." 345 F. Supp., at 314 n. 11.

Although apparently conceding this point, the Government maintains that the challenged classification should nevertheless be upheld as rationally related to the clearly legitimate governmental interest in minimizing fraud in the administration of the food stamp program.[7] In essence, the Government contends that, in adopting the 1971 amendment, Congress might rationally have thought (1) that households with one or more unrelated members are more likely than "fully related" households to

[7] The Government initially argued to the District Court that the challenged classification might be justified as a means to foster "morality." In rejecting that contention, the District Court noted that "interpreting the amendment as an attempt to regulate morality would raise serious constitutional questions." 345 F. Supp., at 314. Indeed, citing this Court's decisions in *Griswold* v. *Connecticut*, 381 U. S. 479 (1965), *Stanley* v. *Georgia*, 394 U. S. 557 (1969), and *Eisenstadt* v. *Baird*, 405 U. S. 438 (1972), the District Court observed that it was doubtful, at best, whether Congress, "in the name of morality," could "infringe the rights to privacy and freedom of association *in the home*." *Ibid.* (Emphasis in original.) Moreover, the court also pointed out that the classification established in § 3 (e) was not rationally related "to prevailing notions of morality, since it in terms disqualifies all households of unrelated individuals, without reference to whether a particular group contains both sexes." *Id.*, at 315. The Government itself has now abandoned the "morality" argument. See Brief for Appellant 9.

contain individuals who abuse the program by fraudulently failing to report sources of income or by voluntarily remaining poor; and (2) that such households are "relatively unstable," thereby increasing the difficulty of detecting such abuses. But even if we were to accept as rational the Government's wholly unsubstantiated assumptions concerning the differences between "related" and "unrelated" households, we still could not agree with the Government's conclusion that the denial of essential federal food assistance to *all* otherwise eligible households containing unrelated members constitutes a rational effort to deal with these concerns.

At the outset, it is important to note that the Food Stamp Act itself contains provisions, wholly independent of § 3 (e), aimed specifically at the problems of fraud and of the voluntarily poor. For example, with certain exceptions, § 5 (c) of the Act, 7 U. S. C. § 2014 (c), renders ineligible for assistance any household containing "an able-bodied adult person between the ages of eighteen and sixty-five" who fails to register for, and accept, offered employment. Similarly, §§ 14 (b) and (c), 7 U. S. C. §§ 2023 (b), (c), specifically impose strict criminal penalties upon any individual who obtains or uses food stamps fraudulently.[8] The existence of these pro-

[8] 7 U. S. C. §§ 2023 (b) and (c) provide:

"(b) Whoever knowingly uses, transfers, acquires, alters, or possesses coupons or authorization to purchase cards in any manner not authorized by this [Act] or the regulations issued pursuant to this [Act] shall, if such coupons or authorization to purchase cards are of the value of $100 or more, be guilty of a felony and shall, upon conviction thereof, be fined not more than $10,000 or imprisoned for not more than five years or both, or, if such coupons or authorization to purchase cards are of a value of less than $100, shall be guilty of a misdemeanor and shall, upon conviction thereof, be fined not more than $5,000 or imprisoned for not mose than one year, or both.

"(c) Whoever presents, or causes to be presented, coupons for payment or redemption of the value of $100 or more, knowing the

visions necessarily casts considerable doubt upon the proposition that the 1971 amendment could rationally have been intended to prevent those very same abuses. See *Eisenstadt* v. *Baird*, 405 U. S. 438, 452 (1972); cf. *Dunn* v. *Blumstein*, 405 U. S. 330, 353–354 (1972).

Moreover, in practical effect, the challenged classification simply does not operate so as rationally to further the prevention of fraud. As previously noted, § 3 (e) defines as an eligible "household" "a group of related individuals . . . [1] living as one economic unit [2] sharing common cooking facilities [and 3] for whom food is customarily purchased in common." Thus, two *unrelated* persons living together and meeting all three of these conditions would constitute a single household ineligible for assistance. If financially feasible, however, these same two individuals can legally avoid the "unrelated person" exclusion simply by altering their living arrangements so as to eliminate any one of the three conditions. By so doing, they effectively create two separate "households," both of which are eligible for assistance. See *Knowles* v. *Butz*, — F. Supp. — (ND Calif. 1973). Indeed, as the California Director of Social Welfare has explained: [9]

> "The 'related household' limitations will eliminate many households from eligibility in the Food Stamp Program. It is my understanding that the Congressional intent of the new regulations are specifically aimed at the 'hippies' and 'hippie communes.'

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same to have been received, transferred, or used in any manner in violation of the provisions of this [Act] or the regulations issued pursuant to the [Act] shall be guilty of a felony and shall, upon conviction thereof, be fined not more than $10,000 or imprisoned for not more than five years, or both, or, if such coupons are of a value less than $100, shall be guilty of a misdemeanor and shall, upon conviction thereof, be fined not more than $5,000 or imprisoned for not more than one year, or both."

[9] Appendix 43.

> Most people in this category can and will alter their living arrangements in order to remain eligible for food stamps. However, the AFDC mothers who try to raise their standard of living by sharing housing will be affected. They will not be able to utilize the altered living patterns in order to continue to be eligible without giving up their advantage of shared housing costs."

Thus, in practical operation, the 1971 amendment excludes from participation in the food stamp program, *not* those persons who are "likely to abuse the program" but, rather, *only* those persons who are so desperately in need of aid that they cannot even afford to alter their living arrangements so as to retain their eligibility. "Traditional" equal protection analysis does not require that every classification be drawn with precise "mathematical nicety." *Dandridge* v. *Williams*, *supra*, at 485. But the classification here in issue is not only "imprecise"; it is wholly without any rational basis. The judgment of the District Court holding the "unrelated person" provision invalid under the Due Process Clause of the Fifth Amendment is therefore

Affirmed

SUPREME COURT OF THE UNITED STATES

No. 72–534

United States Department of Agriculture et al., Appellants, *v.* Jacinta Moreno et al.	On Appeal from the United States District Court for the District of Columbia.

[June 25, 1973]

MR. JUSTICE DOUGLAS, concurring

Appellee, Jacinta Moreno, is a 56-year-old diabetic who lives with Ermina Sanchez and the latter's children. The two share common living expenses, Mrs. Sanchez helping to care for this appellee. Appellee's monthly income is $75, derived from public assistance, and Mrs. Sanchez's is $133, also derived from public assistance. This household pays $95 a month for rent, of which appellee pays $40, and $40 a month for gas and electricity, of which appellee pays $10. Appellee spends $10 a month for transportation to a hospital for regular visits and $5 a month for laundry. That leaves her $10 a month for food and other necessities. Mrs. Sanchez and the three children received $108 worth of food stamps per month for $18. But under the "unrelated" person provision of the Act,[1] she will be cut off if appellee Moreno continues to live with her.

[1] Section 3 (e) of the Food Stamp Act provides in relevant part: "The term 'household' shall mean a group of related individuals (including legally adopted children and legally assigned foster children) or non-related individuals over age 60 who are not residents of an institution or boarding house, but are living as one economic unit sharing common cooking facilities and for whom food is customarily

Appellee Sheilah Hejny is married and has three children, ages 2 to 5. She and her husband took in a 20-year-old girl who is unrelated to them. She shares in the housekeeping. The Hejnys pay $14 a month and receive $144 worth of food stapms. The Hejnys comprise an indigent household. But if they allow the 20-year-old girl to live with them, they too will be cut off from food stamps by reason of the "unrelated" person provision.

Appellee Keppler has a daughter with an acute hearing deficiency who requires instruction in a school for the deaf. The school is in an area where the mother cannot afford to live. So she and her two minor children moved into a nearby apartment with a woman—who, like appellee Keppler, is on public assistance but

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purchased in common." 7 U. S. C. § 2012 (e), as amended 84 Stat. 2048.

The Regulations provide: " 'Household' means a group of persons excluding roomers, boarders, and unrelated live-in attendants necessary for medical housekeeping or child care reasons, who are not residents of an institution or boarding house, and who are living as one economic unit sharing common cooking facilities and for whom food is customarily purchased in common:

"Provided, That:

"(1) When all persons in the group are under 60 years of age, they are all related to each other; and

"(2) When more than one of the persons in the group is under 60 years of age, and one or more other persons in the group is 60 years of age or older, each of the persons under 60 years of age is related to each other or to at least one of the persons who is 60 years of age or older." 7 CFR § 770.2 (jj).

"Eligibility for and participation in the program shall be on a household basis. All persons, excluding roomers, boarders, and unrelated live-in attendants necessary for medical, housekeeping or child care reasons, residing in common living quarters shall be consolidated into a group prior to determining if such a group is a household as determined in § 270.2 (jj) of this subchapter." 7 CFR § 271.3 (a).

who is not related to her. As a result appellee Keppler's food stamps have been cut off because of the "unrelated" person provision.

These appellees instituted a class action to enjoin the enforcement of the "unrelated" person provision of the Act.

The "unrelated" person provision of the Act creates two classes of persons for food stamp purposes: one class is composed of people who are all related to each other and all in dire need; and the other class is composed of households that have one or more persons unrelated to the others but have the same degree of need as those in the first class. The first type of household qualifies for relief, the second cannot qualify, no matter the need. It is that application of the Act which is said to violate the conception of equal protection that is implicit in the Due Process Clause of the Fifth Amendment. *Bolling* v. *Sharpe*, 347 U. S. 497, 499.

The test of equal protection is whether the legislative line that is drawn bears "some rational relationship to a legitimate" governmental purpose.[2] *Wilber* v. *Aetna Casualty & Surety Co.*, 406 U. S. 164, 172. The requirement of equal protection denies government "the power

[2] The purpose of the present Act was stated by Congress:

"to safeguard the health and well-being of the *Nation's* population and *raise levels of nutrition* among low-income households. The Congress hereby finds that the limited food purchasing power of low-income household contributes *to hunger and malnutrition* among members of such households. The Congress further finds that increased utilization of food in establishing and maintaining *adequate levels of nutrition* will promote the distribution in a beneficial manner of our agricultural abundances and will strengthen our agricultural economy, as well as result in more orderly marketing and distribution of food. To alleviate such hunger and malnutrition, a food stamp program is herein authorized which will permit *low-income households to purchase a nutritionally adequate diet* through normal channels of trade." (Italics added.) 7 U. S. C. § 2011.

to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective" of the enactment. *Reed* v. *Reed*, 404 U. S. 71, 76.

This case involves desperately poor people with acute problems who, though unrelated, come together for mutual help and assistance. The choice of one's associates for social, political, race, or religious purposes is basic in our constitutional scheme. *NAACP* v. *Alabama*, 357 U. S. 449, 460; *Dejonge* v. *Oregon*, 299 U. S. 353, 363; *NAACP* v. *Button*, 371 U. S. 415, 429–431; *Gibson* v. *Florida Investigating Committee*, 372 U. S. 539; *NAACP* v. *Alabama*, 372 U. S. 288. It extends to "the associational rights of the members" of a trade union. *Brotherhood of RR Trainmen* v. *Virginia*, 377 U. S. 1, 8.

I suppose no one would doubt that an association of people working in the poverty field would be entitled to the same constitutional protection as those working in the racial, banking, or agricultural field. I suppose poor people holding a meeting or convention would be under the same constitutional umbrella as others. The dimensions of the "related" person problem under the Food Stamp Act are in that category. As the facts of this case show, the poor are congregating in households where they can better meet the adversities of poverty. This banding together is an expression of the right of freedom of association that is very deep in our traditions.

Other like rights have been recognized that are only peripheral First Amendment rights—the right to send one's child to a religious school, the right to study the German language in a private school, the protection of the entire spectrum of learning, teaching, and communicating ideas, the marital right of privacy. *Griswold* v. *Connecticut*, 381 U. S. 479, 482–483.

As the examples indicate, these peripheral constitutional rights are exercised not necessarily in assemblies that congregate in halls or auditoriums but in discrete individual actions such as parents placing a child in the school of their choice. Taking a person into one's home because he is poor or needs help or brings happiness to the household is of the same dignity.

Congress might choose to deal only with members of a family of one or two or three generations, treating it all as a unit. Congress, however, has not done that here. Concededly an individual living alone is not disqualified from the receipt of food stamp aid, even though there are other members of the family with whom he might theoretically live. Nor are common-law couples disqualified: they like individuals, living alone, may qualify under the Act if they are poor—whether they have abandoned their wives and children and however antifamily their attitudes may be. In other words, the "unrelated" person provision was not aimed at the maintenance of normal family ties. It penalizes persons or families who have brought under their roof an "unrelated" needy person. It penalizes the poorest of the poor for doubling up against the adversities of poverty.

But for the constitutional aspects of the problem, the "unrelated" person provision of the Act might well be sustained as a means to prevent fraud. Fraud is a concern of the Act. 7 U. S. C. §§ 2023 (b) and (c). Able bodied persons must register and accept work or lose their food stamp rights. 7 U. S. C. § 2014 (c). I could not say that this "unrelated" person provision has no "rational" relation to control of fraud. We deal here, however, with the right of association, protected by the First Amendment. People who are desperately poor but unrelated come together and join hands with the aim better to combat the crises of poverty. The need of those living together better to meet those

crises is denied, while the need of households made up of relatives that is no more acute is serviced. Problems of the fisc, as we stated in *Shapiro* v. *Thompson*, 394 U. S. 618, 633, are legitimate concerns of government. But government "may not accomplish such a purpose by invidious distinctions between classes of its citizens." *Id.*, 634.

The legislative history of the Act [3] indicates that the "unrelated" person provision of the Act was to prevent "essentially unrelated individuals who voluntarily chose to cohabit and live off food stamps" [3]—so-called "hippies" or "hippy communes" from participating in the Food Stamp program. As stated in the Conference Report,[4] the definition of household was designed to prohibit food stamp assistance to communal 'families' of unrelated individuals."

The right of association, the right to invite the stranger into one's home is too basic in our constitutional regime to deal with roughshod. If there are abuses inherent in that pattern of living against which the Food Stamp program should be protected, the Act must be "narrowly drawn," *Cantwell* v. *Connecticut*, 310 U. S. 296, 307, to meet the precise end. The method adopted and applied to these cases makes § 3 (e) of the Act unconstitutional by reason of the invidious discrimination between the two classes of needy persons.

Dandridge v. *Williams*, 397 U. S. 471, is not opposed. It sustained a Maryland grant of welfare, against the claim of violation of equal protection, which placed an upper limit in the monthly amount any single family could receive. The claimants had large families so that their standard of need exceeded the actual grants. Their claim was that the grants of aid considered in light of

[3] See 116 Cong. Rec. 42003.

[4] H. R. Rep. No. 91–1793, 91st Cong., 2d Sess., p. 8.

the size of their families created an invidious discrimination against them and in favor of small needy families. The claim was rejected on the basis that state economic or social legislation had long been judged by a less strict standard that comes into play when constitutionally protected rights are involved. *Id.*, at 484–485. Laws touching social and economic matters can pass muster under the Equal Protection Clause though they are imperfect, the test being whether the classification has some "reasonable basis." *Id.*, at 414. *Dandridge* held that "the Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy." *Id.*, at 486. But for the First Amendment aspect of the case, *Dandridge* would control here.

Dandridge, however, did not reach classifications touching on associational rights that lie in the penumbra of the First Amendment. Since the "related" person provision is not directed to the maintenance of the family as a unit but treats impoverished households composed of relatives more favorably than impoverished households having a single unrelated person, it draws a line that can be sustained only on a showing of a "compelling" governmental interest.

The "unrelated" person provision of the present Act has an impact on the rights of people to associate for lawful purposes with whom they choose. When state action "may have the effect of curtailing the freedom to associate" it "is subject to the closest scrutiny." *NAACP* v. *Alabama*, *supra*, at 460–461. The "right of the people peaceably to assemble" guaranteed by the First Amendment covers a wide spectrum of human interests—including, as stated in *NAACP* v. *Alabama*, at 460, "political, economic, religious, or cultural matters." Banding together to combat the common foe of hunger is in that

category. The case therefore falls within the zone represented by *Shapiro* v. *Thompson, supra,* which held that a waiting period on welfare imposed by a State on the "in-migration of indigents" penalizing the constitutional right to travel could not be sustained absent a "compelling governmental interest." 394 U. S., at 634.

SUPREME COURT OF THE UNITED STATES

No. 72-534

United States Department of Agriculture et al., Appellants, *v.* Jacinta Moreno et al.	On Appeal from the United States District Court for the District of Columbia.

[June 25, 1973]

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE concurs, dissenting.

For much the same reasons as those stated in my dissenting opinion in *United States Department of Agriculture* v. *Murry*, — U. S. —, I am unable to agree with the Court's disposition of this case. Here appellees challenged a provision in the Federal Food Stamp Act, 7 U. S. C. § 2011 *et seq.*, which limited food stamps to related people living in one "household." The result of this provision is that unrelated persons who live under the same roof and pool their resources may not obtain food stamps even though otherwise eligible.

The Court's opinion would make a very persuasive congressional committee report arguing against the adoption of the limitation in question. Undoubtedly Congress attacked the problem with a rather blunt instrument, and just as undoubtedly persuasive arguments may be made that what we conceive to be its purpose will not be significantly advanced by the enactment of the limitation. But questions such as this are for Congress, rather than for this Court; our role is limited to the determination of whether there is any rational basis on which Congress could decide that public funds made available under the food stamp program should not go

to a household containing an individual who is unrelated to any other member of the household.

I do not believe that asserted congressional concern with the fraudulent use of food stamps is, when interpreted in the light most favorable to sustaining the limitation, quite as irrational as the Court seems to believe. A basic unit which Congress has chosen for determination of availability for food stamps is the "household," a determination which is not criticized by the Court. By the limitation here challenged, it has singled out households which contain unrelated persons and made such households ineligible. I do not think it is unreasonable for Congress to conclude that the basic unit which it was willing to support with federal funding through food stamps is some variation on the family as we know it—a household consisting of related individuals. This unit provides a guarantee which is not provided by households containing unrelated individuals that the household exists for some purpose other than to collect federal food stamps.

Admittedly, as the Court points out, the limitation will make ineligible many households which have not been formed for the purpose of collecting federal food stamps, and will at the same time not wholly deny food stamps to those households which may have been formed in large part to take advantage of the program. But, as the Court concedes, " 'traditional' equal protection analysis does not require that every classification be drawn with precise mathematical nicety,' " *ante*, p. 10. And earlier this term, the constitutionality of a similarly "imprecise" rule promulgated pursuant to the Truth-in-Lending Act was challenged on grounds such as those urged by appellees here. In *Mourning* v. *Family Publications Service, Inc.*, — U. S. — (1973), the imposition of the rule on *all* members of a defined class was sustained because it served

to discourage evasion by a substantial portion of that class of disclosure mechanisms chosen by Congress for consumer protection.

The limitation which Congress enacted could, in the judgment of reasonable men, conceivably deny food stamps to members of households which have been formed solely for the purpose of taking advantage of the food stamp program. Since the food stamp program is not intended to be a subsidy for every individual who desires low cost food, this was a permissible congressional decision quite consistent with the underlying policy of the Act. The fact that the limitation will have unfortunate and perhaps unintended consequences beyond this does not make it unconstitutional.